(1)

Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1997

Eric Snyder,

Petitioner

v.

A Thomas DeWoskin, Trustee

On Petition For Writ Of Certiorari
To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ERIC SNYDER
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ST. LOUIS, MISSOURI
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71 pp

1. Whether the bankruptcy court had authority to determine the issues regarding the complaint and the validity of the lien when it had entered an order that the estate had abandoned the real estate and granted relief from stay to the lender.

2. Whether the bankruptcy court or any other court had authority to enter an order regarding the exemption interest of the debtor when an indispensable party, debtor, was not a party to the litigation.

3. Whether the petitioner was frivolous for appealing whether the parties had agreed to the submission of the case.

4. Whether petitioner's filing of a combination pre trial brief / motion for summary judgment submitted the case to the bankruptcy court so it had authority to enter without hearing a judgment other than the summary judgment requested by the petitioner and in some respects contrary to the summary judgment requested by the petitioner.

5. Whether the bankruptcy court had the authority to sanction the petitioner without notice to petitioner of its intent to do so and the grounds therefore; and without hearing and whether such action was a violation of due process.

6. Whether the district court and the appeal court had authority to hear the appeals when the bankruptcy court failed to render a final judgment regarding each of the following:

7. No ruling was made on the motion regarding compensation (trustee's complaint regarding the validity of the lien and the motion regarding post petition compensation had been ordered consolidated)

8. The court did not rule on petitioner's lien regarding debtor's exemption interest including no ruling that it had no authority to rule on this question.

9. No ruling on interest and protection / collection costs regarding petitioner's pre petition lien.

10. Petitioner's application for compensation.

11. Whether the district court violated due process and therefore had no authority to enter an order that petitioner's appeal was frivolous when the application of the trustee contained no specific basis nor details of why frivolous except frivolous because petitioner had a purported conflict of interest.

12. Whether such frivolous appeal order of the district court is void or invalid when the order failed to state any grounds or specific details of why the appeal was frivolous.

13. Whether the appeal court can uphold the district court's order of frivolous appeal and whether the appeals court can enter an order that the appeal to it is frivolous when:

14. The appeals court determined that petitioner's advance lien interest in the real estate regarding post petition services was extinguished on a different basis than that asserted by the trustee in and decided by the bankruptcy and district courts; and the issue of extinguishment was an issue of first impression.

15. The appeals court determined that the filing of the bankruptcy petition by the debtor was an election by the estate to terminate the lien interest of the petitioner and written notice of termination by the estate to the petitioner all in accordance with the requirements of Missouri law, but this was not realized by the trustee, trustee's attorney, bankruptcy court, district court, nor the petitioner.

16. When the bankruptcy and district courts didn't rule regarding the exemption interest, but the appeals court did.

17. Whether the appeals could be frivolous when the petitioner was correct on the merits regarding each issue of law and had substantial authority to support his positions and the decisions of the courts involved numerous misstatements of both federal and Missouri law.

18. When the appeals court decided the case was submitted by petitioner's motion for summary judgment. This was a different basis from that of the bankruptcy and district courts that the parties had agreed to submit the consolidated matters without hearing at an earlier hearing. The judgment is not the judgment sought by the motion for summary judgment. The issue of a matter being submitted by a motion for summary judgment is a matter of first impression.

19. Whether the courts had the authority to render the judgments they rendered when the judgments were not the judgment sought by the movant of the motion for summary judgment and trustee had filed no motion for summary judgment.

20. Whether the appeals court had authority to render decisions regarding summary judgment when the bankruptcy and district courts proceeded on a different basis.

21. Whether the appeals court could decide the exemption issue when the indispensable party was not before the courts and the question was not decided by the bankruptcy and district courts.

22. Whether the appeals court could hold that the exemption of debtor was valid regarding petitioner's lien when section 522 (all references in this petition to a section unless indicated otherwise will be a reference to the Bankruptcy Code, 11 U.S.C.) provides that state law determines the exemption; Missouri law holds that a voluntary lien such as that of the petitioner attaches to the exemption interest to the extent the remainder of

the real estate is insufficient to cover the lien and trustee admitted this; and when section 522 (c) provides that the exemption is not effective regarding liens and not effective regarding post petition obligations.

23. Whether the appeals court could hold contrary to federal and Missouri law that the filing of the bankruptcy petition by the debtor (petitioner was his attorney) constituted an election by the estate to terminate the lien interest of the petitioner and written notice to the petitioner that his lien interest had been terminated all in accordance with Missouri law when the trustee had not even been appointed and there is no one else to make the election on behalf of the estate; no written notice was personally delivered to petitioner or mailed by certified mail return receipt requested stating that the trustee had elected on behalf of the trustee to terminate the security interest of the petitioner regarding the interest of the estate in the real estate; when the appeals court cited no authority for such proposition; when the Bankruptcy Code although providing for many things at the time of filing does not provide for such notice; when the election and notice requirement of the Missouri statute are clearly not met; and when the bankruptcy court, trustee, trustee's attorney, district court, and petitioner were all unaware of such notice.

24. Whether the appeals court could hold contrary to the federal law that petitioner had to the employed by the estate to be compensated by the estate when the Bankruptcy Code does not require the attorney for a chapter 7 debtor to be employed by the estate and when section 503 (b) provides for compensation of debtor's attorney; (and when petitioner could make application at any time including now, but the bankruptcy court has threatened petitioner with sanctions if he does so.)

25. When petitioner's affirmative relief regarding the complaint included an application for compensation and requested that the court set a hearing thereon and then trustee filed the motion to review the compensation of the petitioner, whether the bankruptcy court had to set a hearing thereon and determine the application for compensation.

26. The bankruptcy and district courts held that petitioner had a conflict with debtor because petitioner asserted his lien against the property of the estate that otherwise would pay the non dischargeable tax creditors of the debtor. The issue is whether petitioner had a conflict with the debtor when there was no legal basis for a conflict:

27. Petitioner was not asserting his lien against the property of the estate, but maintained that his lien interest in the real estate including his interest for advances was not property of the estate.

28. Debtor and petitioner had agreed that the petitioner would be paid prior to the taxing authorities.

29. All agree that petitioner was not in violation of the ethical requirements of Missouri.

30. Petitioner had no conflict with any of the bankruptcy duties of the debtor to the estate.

And when there is no factual basis for a conflict:

31. The estate had insufficient property to pay the administrative expenses of the estate and could not have paid the taxing authorities. Because of this, the litigation was to increase the amount of compensation that trustee and his attorney could receive from the estate. Trustee and is attorney had a conflict of interest. The litigation, assuming that it was appropriate, should have been brought by the U.S. trustee, not the trustee. *Sturgeon State Bank Vs. Perkey,* 194 B.R. 846 (Bankr WD MO.1996)

32. Debtor agreed, understood, and intended that petitioner would be paid before the taxing authorities and it was therefore impossible for petitioner to have a conflict with debtor.

33. Debtor's primary interest was to have the tax matters resolved. The purpose for filing the bankruptcy was to ensure that petitioner was paid so he could represent the debtor to resolve the tax matters that included not only defense of the criminal matters, but also reduction of the amounts owed; and secondarily as part of the resolution of the tax matters to ensure that the maximum amount was available from the real estate to pay the taxing authorities.

34. Petitioner asserted the lien to protect the debtor. If the lien of petitioner was effective regarding the interest of the estate regarding post petition services, a portion of the exemption would be available to the debtor and to the taxing authorities. This also ensured debtor of continued representation in the tax matter.

35. The taxing authorities would always be paid more if the lien were valid since this amount would come out of the trustee's compensation and more would be unencumbered regarding the exemption interest of the debtor.

and whether section 327 applied to petitioner as attorney for a chapter 7 debtor. The appeals court incorrectly states that section 327 is applicable to the attorney for the debtor in a chapter 7 case even though the attorney is not representing the estate. The appeals court held that section 327 regarding employment by the estate applied to petitioner as attorney for the chapter 7 debtor and concluded that since petitioner was adverse to the estate that petitioner therefore had a conflict of interest

with the debtor. There was no explanation given why this would make petitioner in conflict with the debtor. Petitioner did not represent the estate. The estate is a separate legal entity and has a trustee and an attorney. Petitioner had no conflict with any of the bankruptcy duties of the debtor regarding the estate as set out in section 521. As we have seen, aside from section 327, there is no legal basis to support a conflict of interest. Section 327 only applies to professionals who are employed by the estate. No provision of the bankruptcy code, including specifically section 327, prohibits petitioner from representing debtor when he is not disinterested regarding or adverse to the estate.

36. The concept of the bankruptcy court, district court, and the trustee that property of the estate is any "piece of property" in which debtor has an interest at the time of filing of the bankruptcy and therefore section 542 extinguishes all interests of others in the "piece of property" was correctly not accepted by the appeals court. However, the appeals court incorrectly stated or intimated; and determined that the interests in the property were determined by federal law and not state law contrary to this courts decision in *Butner*. The appeals court found that petitioner's admitted lien interest in the real estate for future advances was extinguished by federal law, section 541, by the federal concept of equity without consideration of the interests in the real estate under Missouri law. Thus, the issue is whether the appeals court correctly determined that the interests in the real estate were determined under federal law and without analyzing and determining what interests the parties held in the property under Missouri law.

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United States Court Of Appeals For The Eighth Circuit:: The opinion,12/17/97, docket numbers 97-1221/2300; the judgment of the same date was issued only under no. 97-1221; on 3/3/98 the court entered an order finding that the appeal was frivolous and sanctioned the petitioner under docket numbers 97-1221/2300. District Court judgment, 11/25/96, and its supplemental order of frivolous appeal and sanctions, 3/3/97, no.4:96 CV 1459-DJS. The Bankruptcy Court order and opinion, 5/ 6/96 was entered under Case no.94-46400-293, chapter 7, Adversary no. 95-4548 -293; and its order of 1/13/95,. Case no.94-46400-293, chapter 7.

Jurisdictional statement

The judgment and opinion of the appeals court affirming the district court were entered 12/17/97. The frivolous / sanction order of the appeals court was entered 3/3/98. This court has jurisdiction pursuant to 28 U.S.C.1254 (1).

Verbatim authorities

United States constitution

Fifth amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Bankruptcy code provisions:11 U.S.C.

503 (b) (1) (A):

After notice and hearing, there shall be allowed as administrative expenses, other than claims allowed under section 502 (f) of this title, including the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case

506 (b):

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, cost, or charges provided for under the agreement under which such claim arose.

522 (c) (2):

Unless the case is dismissed, property accepted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except a debt secured by a lien that is not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724 (a) of this title; and not void under section 506 (d) of this title

541 (a) (1):

The commencement of a case under section 301, 302, or 303 of this title rates an estate. Such estate is comprise of all of the only property, wherever located and by whomever held: (1) except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

542 (a):

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property at the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for such property for the value of such property, unless such property is of inconsequential value or benefit to the estate.

Missouri statutes

443.055.

Future advances may be secured,
how - definitions - requirements -
limitations - priorities - termination procedure, exceptions. -

1. As used in this section, the following terms mean:

(1) "Borrower", a person who is a mortgagor, deed of trust grantor, or debtor of any lender or a successor in interest

to any of the persons described in this subdivision;

(2) "Business or agricultural loan transaction", a loan or extension of credit or indebtedness of a borrower to a lender, arising under a note, guarantee or other evidence of indebtedness, where the proceeds or benefits thereof are used primarily for agricultural purposes, or for purposes other than personal, family or household purposes;

(3) "Construction loan", a loan:

(a) Which is secured by a security instrument; and

(b) The proceeds of which, by agreement of the borrower and lender, are intended to be used for the construction, alteration, modification or addition of improvements to real property; and

(c) The proceeds of which are disbursed in whole or in part by means of future advances or future obligations. The term "construction loan" includes loan proceeds used for expenses reasonably related to the construction, alteration, modification or addition of improvements to real property including governmental fees, taxes, interest, attorneys' and accountants' fees, architects' fees, engineers' fees, utility charges, hook-up or tap-on fees, title insurance, surveys, rents, loan origination or servicing fees, and similar expenses;

(4) "Face amount", subject to the provisions of this section, the stated amount of the obligations which may be secured at any given time by the security instrument;

(5) "Future advance", any advance of funds, disbursement of loan proceeds or other exchange of value or consideration from a lender to, or on behalf of, a borrower that occurs after the date of the security instrument securing such future advance, regardless of whether such advance is made under a note, contract, guarantee or other evidence of indebtedness that was executed prior to or contemporaneously with such security instrument or made under a future obligation;

(6) "Future obligation", an obligation or debt of a borrower to a lender arising under a note, contract, guarantee or other evidence of indebtedness that was executed or otherwise became effective after the date of the instrument securing such future obligation, including, without limitation, any note or agreement that renews, extends, or otherwise modifies an obligation of a borrower to a lender that is secured by a security instrument under this section;

(7) "Lender", any mortgagee, deed of trust beneficiary, or creditor holding a security instrument;

(8) "Owner", the owner of the interest in the real property encumbered by the security instrument, not including the trustee, mortgagee, or beneficiary under a deed of trust;

(9) "Person", a natural person, firm, partnership, association, or corporation;

(10) "Security instrument", a mortgage, deed of trust, or other real property security instrument securing the repayment of any obligation, containing, within the body of the instrument, the provisions described in subsection 2 of this section and containing a provision expressly stating that the instrument is to be governed by this section.

2. Security instruments may secure future advances or other future obligations of a borrower to a lender, whether the advances or obligations are optional or obligatory with the lender. The future advances or future obligations may be evidenced by one or more notes, guarantees or other documents evidencing indebtedness of a borrower to lender, which documents shall not be required to be executed or delivered prior to the date of the security instrument securing them. Neither the existence nor priority of a security instrument otherwise complying with the provisions of this section shall be adversely affected if at any time on or after the date of such security instrument there are no obligations then secured by the security instrument or the obligations secured by the security instrument are

reduced to zero. The fact that a security instrument secures future advances or future obligations shall be clearly stated within the body of the security instrument, or within the body of any amendment if such amendment is made to cause the original instrument to become a security instrument and secure future advances or future obligations as provided in this section, and the security instrument shall state the face amount. The total amount of obligations that may be secured by such a security instrument may decrease or increase from time to time, but except as to advances made pursuant to subsection 3 of this section, the total principal amount of the obligations secured at any given time may not exceed the face amount stated in the security instrument.

3. (1) Future advances made by a lender or future obligations incurred by a borrower for the reasonable protection of the lender's security interest are secured by the security instrument and shall have the priority specified in subsection 5 of this section even though the security instrument does not provide for such future advances or such future obligations, or even though such future advances or such future obligations cause the total indebtedness to exceed the face amount stated in the security instrument, or even though a notice of termination has been issued pursuant to subsection 6 of this section. Such advances or obligations may include, but shall not be limited to, real property taxes, hazard insurance premiums, assessments or maintenance charges imposed under a condominium declaration or restrictive covenant, subdivision assessments, reasonable repairs and maintenance, amounts due under prior mortgages or deeds of trust, leases, or other encumbrances, and reasonable costs and attorneys' fees incurred in enforcing the security instrument or the indebtedness which it secures.

(2) Future advances made or future obligations incurred under a construction loan are secured by the security instrument and shall have the priority specified by subsection 5 of this section even though the future advances or future obligations cause the total indebtedness to exceed the face amount stated in the security instrument, or even

though a notice of termination has been issued pursuant to subsection 6 of this section if the lender complies with paragraph (d) of subdivision (2) of subsection 9 of this section.

4. The future advances and future obligations which may be secured by a security instrument shall be limited to those obligations which are contractual in nature and those obligations referred to in subsection 3 of this section.

5. As to any third party who may acquire or claim any rights in or a lien upon the encumbered real property, the priority of the lien of a security instrument securing future advances or future obligations shall date from the time the security instrument is recorded, whether or not any third party has actual notice of any such advances or obligations and whether or not such advances or obligations are optional or obligatory with the lender. If an amendment to a mortgage, deed of trust, or other real property security instrument securing the repayment of any obligation has been recorded which causes such instrument to become a security instrument or if an amendment to a security instrument has been recorded which increases the total amount of the obligations which may be secured thereby, the priority of advances made or additional obligations incurred thereafter which exceed the original face amount shall date from the date the amendment was recorded, as to any third parties who may acquire any rights in or lien upon the encumbered real property, whether or not any third party has actual notice thereof and whether or not the advances or additional obligations are optional or obligatory with the lender.

6. At any time subsequent to the execution of a security instrument, the owner at that time may give a notice by sending it certified mail, return receipt requested, or by personal delivery (the affidavit of the party personally delivering the notice to be prima facie proof of such delivery), to the lender by sending or delivering it to the lender if such person is an individual, or otherwise by sending or delivering it to the person specified in the security instrument for such purpose, or by sending or

delivering to any person on behalf of the lender, upon whom personal service of process may be served as provided for in section 506.150, RSMo, other than the secretary of state, and the notice shall state therein that the party sending the notice is the present owner of the interest in the real property encumbered by the security instrument and that the prior owner elects to terminate the operation of the instrument as security for future advances or future obligations made or incurred after the date the lender receives the notice.

Statement of the case

In September, 1994, the IRS criminal investigation division was investigating taxpayer / debtor for failing to file and pay taxes for 5 or more years. Since debtor didn't have cash to pay the petitioner and was unemployed, debtor proposed giving a mortgage on his real estate to ensure payment. Debtor and petitioner agreed in a written contract that petitioner would provide legal services to debtor so long as petitioner was assured of being paid. The written agreement, note, and deed of trust for future advances and obligations, "future advances", were executed and the latter 2 recorded on 9/24/94.

Debtor understood and agreed that petitioner be paid before the taxing authorities. This was subsequently confirmed in 10/94 conversations between debtor and petitioner regarding the fact that if the IRS made a jeopardy assessment, its lien would leapfrog over the lien of petitioner regarding future advances.

Subsequently, debtor filed bankruptcy on 11/28/94 because of pending foreclosure on his real estate. Debtor filed to protect the value of his real estate to ensure payment first to the petitioner and secondly to the taxing authorities.

Bankruptcy was not contemplated at the time that legal representation began. However, at the time the decision was made to file bankruptcy, debtor and petitioner agreed that bankruptcy services were covered by the original agreement and before the bankruptcy was filed, debtor and petitioner executed an amended agreement (statement of compensation), note and deed of trust to this effect and recorded the latter 2.

Lender on the real estate sought relief from stay. Debtor and petitioner defended. Lender obtained an order on 1/13/95 pursuant to the consent of the trustee. Petitioner and debtor did not attend because trustee represented to petitioner that lender and trustee had agreed to continued the matter. The order provided that the estate abandoned the real estate and granted lender relief from stay if a firm contract was not obtained by 2/17/95. A firm contract was not obtained until 2/24/95.

The real estate was sold the day before lender was to foreclose. Excess proceeds from the sale without considering the lien of petitioner was $17,172. Petitioner was directly responsible for $9,650 of these proceeds (convinced the trustee not to sell for $8,000 less than the contract ultimately entered into; objected to trustee's overpayment of broker by $1,650). Not only did petitioner defend against relief from stay, but he also significantly participated in the sale of the real estate at the request of debtor and trustee, and pursuant to his right of protection / collection regarding his lien interest in the real estate.

After the sale, the estate a did not have sufficient assets to pay the administrative expenses of the estate. Trustee had agreed that petitioner was entitled to his pre petition lien compensation that was approximately $5,500, but denied that the lien was effective regarding post petition services. Debtor had an $8,000 homestead exemption that was not property of the estate and on which debtor had a lien. The interest and protection / collection costs on the pre petition lien were approximately $1,200 and was not property of the estate. This left the estate with only $2,472. This was insufficient to cover the administrative claims of the petitioner regarding post petition bankruptcy services, especially the protection and sale of the real estate; and the compensation of the trustee and his attorney.

The litigation was commenced by trustee filing a complaint to determine the validity, priority, and extent of the lien regarding pre and post petition services and for review of pre petition services. Petitioner responded including requests for affirmative relief. Trustee then filed a motion to review the compensation of petitioner regarding post petition services.

Petitioner and debtor attempted to settle the litigation. Petitioner at the very least was entitled to the pre petition compensation of $5,500 and the $8,000 exemption. Despite this and since trustee was contesting the post petition lien, debtor and petitioner offered to settle the entire matter for $8,500. This would leave the estate with $8,672. Trustee refused the offer and only would settle for $4,500.

At the hearing of 8/24/95, the 2 matters were consolidated and set for hearing; and a pre trial order was entered.

Subsequently, the trustee filed a motion that the response of the petitioner to the complaint was frivolous in 2 regards. This matter was never heard by the court.

The parties filed and served their pre trial materials pursuant to the pre trial order. Petitioner, realizing that he was entitled to judgment as a matter of law filed a combination pre trial brief / motion for summary judgment.

The court continued the hearing on the consolidated matters and again continued the hearing.

Petitioner in response filed a motion requesting either that the court enter judgment for petitioner on his motion for summary judgment or that the matter be tried so petitioner could decide whether to continue to represent the debtor.

The court then entered an opinion on only the complaint. The court granted petitioner his pre petition lien for "tax services" in full, $4,348.80, and granted petitioner $1,000 of $1,106 for pre petition "bankruptcy services", thus essentially awarding petitioner all of his pre petition compensation in full. The court held that petitioner's advance lien was extinguished by section 542 at the time of the filing of the bankruptcy. The court held that it did not have to determine whether the lien extended to debtor's exemption. The court sanctioned petitioner $1,000 because of an alleged direct conflict of interest with debtor because petitioner had asserted his lien against the interest of the estate in the real estate that would otherwise have paid the non dischargeable tax debts of the debtor.

Petitioner appealed to the district court. The district court affirmed the bankruptcy court without opinion or comment. Subsequently, after petitioner had filed notice of appeal, trustee filed a motion that the appeal to the district court was frivolous. The district court declared that the appeal was frivolous without stating any basis why the appeal was frivolous and awarding trustee his attorney fees and double costs in the amount of $4,352.80.

Petitioner separately appealed because of the tardy filing of the motion both the judgment and order and the appeals were consolidated. The appeals

court affirmed the district court regarding both appeals. By order of 3/3/98, the appeals court determined that the appeals to it were frivolous and sanctioned petitioner $7,093.79 in attorney fees and costs and asserting for the first time that the assertion of the lien on debtor's exemption interest was a conflict of interest with debtor.

This petition for writ of certiorari ensues in an attempt to have the numerous irregularities of these proceedings corrected and to also correct the numerous incorrect declarations of both federal and state law for society, the legal profession, and for petitioner.

According to the statement of the trustee, the bankruptcy court had jurisdiction of the complaint pursuant to 28 U.S.C.157 and 1334, F.R.B.P.7001 (2), and district court local rule 29. The motion does not state the jurisdiction of the court.

Argument

Issues

Issue 1: Abandonment of real estate

The estate abandoned the real estate and no longer had any interest therein after 2/17/95. The court had no authority to enter orders regarding the real estate after this time. It could not determine the complaint regarding the validity of the lien.

On 1/10/95, the court ordered that the real estate would be abandoned and lender would be granted relief from stay if trustee did not obtain a firm contract for the sale of the real estate by 2/17/95. A firm contract was not obtained until 2/24/95.

The estate did not have an interest in the real estate after abandonment on 2/10/95. The abandonment is irrevocable. *In re Wornell*, 70 Bankr 153 (Bankr WD MO.1986). Relief from stay also automatically removed the real estate from the estate. *In re Griggs*, 82 Bankr 532 (Bankr WD MO.1988). The interests in the real estate were then held by the lender, debtor, and petitioner.

Issue 2 & 20: Exemption interest: indispensable party

Debtor was an indispensable party regarding his exemption interest. F.R.C.P.19 (a). Debtor was not a party to the litigation. No court had any authority to enter an order regarding the exemption interest.

Issue 3: Not frivolous to appeal whether case had been submitted

By continuing the case twice, the court indicated that the consolidated matters had not been submitted by agreement of the parties. The appeals court posited the summary judgment theory in an attempt to save the bankruptcy court, district court, and the trustee from their position that the parties had agreed to the submission of the case. Petitioner was not frivolous in appealing this position.

Issue 4, 17, 18 & 19: Submission by request for summary judgment

This is an issue of first impression that affects the entire judicial system, the legal profession, and all litigants who file motions for summary judgment.

The Court indicates that the case was submitted because petitioner requested a summary judgment. Petitioner has been unable to find any authority for this proposition.

F.R.C.P. 56, itself, does not support this conclusion.

The rule indicates that if a party desires a summary judgment, the party must file a motion for summary judgment. The trustee could file a motion for summary judgment at any time. See subsections (a) and (b). This is especially true as the trustee is the party adverse to the movant for the summary judgment. The trustee never filed a motion for summary judgment. The judgment in this case is a summary judgment for the trustee.

The court only has authority to render a judgment for a party that has moved for a summary judgment. The rule provides that the judgment sought by the moving party may be entered. Sub section (c) provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (emphasis mine) Petitioner was the only party to make a motion for summary judgment and was the only party for whom the court was authorized to enter a judgment.

Also, the court is required to hold a hearing. See sentences 1 and 2 of subsection (c) and sentence 1 of subsection (d).

Additionally, prior to the court entering a judgment for the moving party, the court, as indicated by the foregoing quote, must find that there is no controverted material facts. The record is clear in this case that the court did find that there were controverted facts. The parties never even agreed upon a joint statement of facts. The case was not submitted pursuant to uncontested facts. A sampling of contested facts follows:

1. The court determined that there was a genuine issue as to whether the agreements of debtor and petitioner covered "bankruptcy services".
2. Trustee requested that the court review the compensation of the petitioner. This put in issue whether the compensation requested by the petitioner was reasonable and necessary regarding "bankruptcy services" and how much petitioner was entitled to regarding such services. (petitioner had subpoenaed the time records of the trustee and his employees to establish relatively what each had done regarding the preservation and sale of the real estate. If the facts were uncontroverted, then the statements and there affidavit were conclusive since trustee did not contest these. If the bankruptcy court took objection to any of these items, the court considered that there was a genuine issue regarding the facts and had to hold a hearing regarding these facts and give the petitioner an opportunity to testify to these facts. (There was no objection to these items since the court upheld all of the compensation of the petitioner except for $106 regarding pre petition "bankruptcy services".)
3. There was a factual question regarding whether the trustee had requested that petitioner continue to interface with the broker.
4. There was the question of the amount of protection / collection costs regarding the pre petition "tax services".
5. Petitioner had objected to the admission of his deposition into evidence.

This is only a sampling of contested matters; there were more.

The motion for summary judgment is summary and not intended to be the complete and full presentation of the moving party 's case. It is a procedure for the moving party to avoid having to put on his entire case. The movant is saying this is a limited version of my case and based on these limited facts that I believe are not contested or can not be contravened; and the controlling law, I am entitled to judgment; therefore, enter judgment on my behalf. The movant is not saying that he does not additional or more full

and complete facts. If the adverse party does not believe that the movant does not have such facts and that the adverse party is entitled to a judgment based on the scenario that movant has posited or that there are uncontroverted facts and controlling law that entitle the adverse party to summary judgment, the adverse party is required to file his own motion for summary judgment. See subsections (a), (b), and (c).

The motion for summary judgment did not submit the case to the bankruptcy court. Trustee believed that the consolidated matters were submitted to the court by a purported agreement of the parties at the pre trial hearing of August 24, 1995. The transcript of this hearing doesn't support this contention and the appeal court did not support it.

(Trustee 's frivolous motion was not submitted to the court nor ever ruled upon by the court.)

Issue 5: Purported conflict of interest: Violation of due process; no notice nor opportunity to defend

There are minimum standards of fairness that must be applied by the courts.

The imposition of sanctions by the bankruptcy court is a violation of the constitutional due process requirements of the fifth and fourteenth amendments and has created serious problems in ensuring that this issue is determined on a substantive basis in accordance with the law.

The petitioner was given no notice that the court intended to impose sanctions until after the fact nor of the basis on which the court believed there were grounds for the imposition of sanctions. Petitioner was not made aware of these matters until after the court had rendered its opinion. Another circuit court of appeals has held that this is a requirement of due process. *Busy Beaver*, 19 F.3d 833. Because of this, petitioner had no opportunity to defend. If petitioner had been given the opportunity, he could have met the assertions of the court and there is a high probability that numerous problems could have been avoided.

The court never advised petitioner that it was considering the imposition of sanctions for a conflict with the debtor.

The trustee 's motion for frivolous pleading regarding the answer of petitioner to the complaint was a matter ancillary to the complaint. This motion was never before the court and never heard. This motion was not

part of the consolidated matters and was not part of the pre trial orders. (In fact, the motion was filed subsequent to the hearing that consolidated the 2 matters. Trustee had scheduled the matter for hearing on Oct. 5, 1995, but the court canceled this hearing. The motion was not continued nor ever rescheduled.

The motion was never ruled upon by the court. The court in its order and opinion did not mention the motion for frivolous pleading nor, of course, ever make a decision on it.

The motion for frivolous pleading was completely different from the basis for the sanction. The basis for the sanction was that petitioner had a conflict of interest with the debtor because the petitioner had asserted his lien interest against the property of the estate and therefore the amount the estate could pay regarding the non dischargeable debt of the IRS was less.

On the other hand, the grounds for the frivolous motion were 2:

1. There was no basis for petitioner 's lien to be valid regarding the estate regarding post petition services because the entire piece of real estate became property of the estate as of the filing of the petition. This does not indicate that there is a conflict with debtor. (The only similarity are the misunderstandings of the judge and the trustee that the estate consists of pieces of property in which the debtor had an interest rather than the correct concept that the property of the estate consists of the debtor 's interests in property rather than the property; and based on this misconception, that petitioner was requesting compensation from the estate regarding his lien rather than from his interest in the real estate. This was a misconception since his lien for future advances / obligations was an interest in the real estate and did not become property of the estate.).
2. Even if the lien were invalid regarding post petition services, petitioner could not be compensated by the estate because he was not employed by the estate. This does not indicate that there is a conflict with debtor.

Petitioner had no notice that the court was contemplating the imposition of a sanction because petitioner had a conflict with the debtor nor did petitioner have an opportunity to defend this question in the bankruptcy court. If he had or if the court had conducted a hearing as requested by the petitioner, petitioner would have had the opportunity to resolve the misconception regarding what constituted the property of the estate and that petitioner was asserting his lien against the property of the estate.

Issue 6: Not a final judgment

The bankruptcy court did not render a final judgment because it did not render a judgment regarding the following matters that were before the court for a determination: Bankruptcy Rule 8001; *United States vs.Indrelunas*, 411 U.S. 216 (1973);. *In re Gaines*, 932 F.2d 729 (8th cir. 1991).

The court did not render a decision regarding trustee 's motion to review compensation. Two matters had been consolidated to be heard together. They were the complaint and the motion. The opinion and the order made no mention of the motion nor any of the issues therein, but only mentioned the complaint and its issues. See the opinion and especially pages 4 and 5.

The bankruptcy court never ruled on the merits regarding whether debtor's exempt interest was subject to the lien of attorney. The court said, "not necessary to address this issue". See page 13.

The bankruptcy court failed to make any decision regarding interest and protection / collection costs and to award same. The court awarded petitioner his pre petition lien for "tax services" in full. The court only denied compensation to the extent of $1,000, the sanction for the purported conflict of interest. The lien required interest and protection / collection costs. Petitioner requested this relief. Section 506 (b), required that the court award interest and protection / collection costs because petitioner had filed a claim. The court noted in its opinion that there were protection / collection costs. However, the court did not determine the amount of these protection / collection costs nor award them.

The bankruptcy court did not decide petitioner's application for compensation. The complaint and the motion were consolidated and to be heard together. Petitioner 's affirmative relief regarding the complaint requested that it be considered an application for compensation. If this was insufficient to place the matter in issue, trustee's subsequent motion to review compensation placed the matter of awarding compensation in issue. The billing statements of petitioner were in the record. The compensation disclosure statement agreement was in the record. The requirements of Bankruptcy Rule2016 (a) regarding the application for compensation had been met.

Issue 11: Application of trustee failed to meet the requirements of F.R.C.P.11

The application of the trustee that the appeal to the district court was frivolous failed to meet the requirements of F.R.C.P.11 (c) (1). The appeals court correctly stated that the requirements of rule 11 were applicable to the determination of whether there was a frivolous appeal.

The application did not describe the specific conduct that was alleged to the a violation. The application stated no analysis nor reason why the appeal was frivolous other than the purported conflict of interest.

The application also was not timely. The rule states that the adverse party has 21 days in which to correct the matter. This indicates that the motion should have been made after the notice of appeal had been filed and prior to the briefing of the appeal and certainly before oral argument and decision by the court. The application also was not timely pursuant to local district court rules 9.01 (D) (1) and 8.02.

Issue 12: Failure to state grounds and details

As previously stated, the appeals court held that rule 11 was applicable to the district court determination that the appeal was frivolous. F.R.C.P.11 (c) (3) requires the court imposing sanctions to "... describe the conduct determined to constituted a violation of this rule and explained the basis for the sanction imposed." The order of the court simply stated that the appeal was frivolous.

Issue 13: Whether the appeals are frivolous

The subsidiary issues are discussed elsewhere. Submission by summary judgment is discussed previously at issue 4. The other issues are discussed subsequently regarding the substantive matters to which they refer.

Issue 22: Petitioner's lien attaches to the exemption interest

Whether a voluntary lien is effective regarding the homestead exemption is extremely important to lenders in Missouri. The statement of the law by the appeals court would change this and the lien would no longer be effective regarding the homestead exemption.

Pursuant to section 522 (d), Missouri has opted out and bankruptcy exemptions are determined by Missouri law. Pursuant thereto debtor claimed and has a homestead exemption for $8,000 (there was no objection). Under Missouri law, petitioner's lien is effective regarding the

exemption interest of the debtor when the other interests in the real estate are insufficient to cover the lien. V.A.M.S. section 513.475 and 513.475-513.530. *Martin Vs. Lewis*, 244 S.W.2d 87, Paragraph 29 (Mo banc 1951).

Furthermore, the pre petition lien of the petitioner was not discharged by the bankruptcy. *Pruellage v. DeSeaton Corp.*, 407 S.W.2d 36 (MoApp E.D.1966). For this additional reason, the exemption is liable for most petition services as well as pre petition services.

Trustee admitted for the first time at oral argument in the appeals court that under Missouri law, the lien was effective regarding the exemption interest.

Furthermore, the Code provides that the exemption is not effective regarding petitioner's lien. Section 522 (c) delineates the effect of an exemption. An exemption is effective regarding pre petition debts. However, pursuant to section 522 (c) (2), the exempt interest is liable for "a debt secured by a lien that is" not avoided pursuant to certain sections nor void under another section none of which are applicable to this case.

The legislative history confirms that the exempt interests is subject to a valid lien. "The rule of *Long Vs. Ballard*, 117 U.S. 617 (1886), is accepted with respect to the enforcement of valid liens on non exempt property as well as on exempt property." H. Report No.95-595 to accompany H.R. 8200, 95th Congress, First Session (1977) Pages 360-363.

Since the Code only states that the exemption is effective regarding pre petition obligations, the exemption is not effective regarding post petition obligations. Petitioner provided post petition services that were covered by his lien.

Furthermore, petitioner had an equitable lien that covered the post petition services. Debtor was to pay attorney for his services from proceeds of the sale of the real estate. This meets the 3 requirements for an equitable lien, *Dave Kolb Grading Vs. Lieberman Corp.*, 837 S.W.2d 924, Paragraph 16 (MoApp E.D.1992): The obligation is owed by debtor to attorney; there is a res to which the obligation fastens and which can be identified with reasonable certainty; and the intent, both express and implied, was that the property serve as security for the payment of the obligation.

The advance lien applies to the exempt interest. The fact that there is an exemption makes no difference. The lien is valid regarding the exempt

interest; the exemption does not have to be contested. The equitable lien also is effective regarding post petition services.

Issue 23: Election to terminate and notice of termination

As a matter of fundamental fairness, it was important that the petitioner be notified that the estate had made an election to terminate and was terminating petitioner's interest in the real estate. If this information were provided to him, he could have made a decision to continue or cease providing services to the debtor. This information was never provided to him. This is conclusively shown by the fact that all participants in the matter were unaware that notice had been given. The result is the unconstitutional taking of property without due process. United States Constitution, amendments V & XIV

Strict statutory requirements for notice of election to terminate encumbrance for future advances / obligations

The appeal court claims that the interest of petitioner was terminated in accordance with the termination provisions of the Missouri future advance / obligation statute. This statute provides that the present interest owner may elect to terminate and terminate the encumbrance regarding future advances and obligations only by sending or delivering notice of the election by either:

1. sending written notice of election and termination by certified mail return receipt requested; or
2. personal delivery of the written notice of election and termination;

and specifying the contents of the notice.

The statute, V.A.M.S.443.055, specifically provides the following:

> 443.055. Future advances may be secured,
>
> 6. At any time subsequent to the execution of a security instrument, the owner at that time may give a notice by sending it certified mail, return receipt requested, or by personal delivery (the affidavit of the party personally delivering the notice to be prima facie proof of such delivery), to the lender by sending or delivering it to the lender if such person is an individual, or otherwise by sending or delivering it to the person specified in the security instrument for such purpose, or by sending or delivering to any person on behalf of the lender, upon whom personal service of process may be served as provided for in section 506.150, RSMo, other than the secretary of state, and the notice shall state therein that the party sending the

notice is the present owner of the interest in the real property encumbered by the security instrument and that the prior [present] owner elects to terminate the operation of the instrument as security for future advances or future obligations made or incurred after the date the lender receives the notice. (emphasis mine)

An election must be made. No election was made.

The court claims that the estate made the election since it notes that the successor in interest, the estate, has the right to elect and to terminate the encumbrance. How does the estate make the election. An election indicates the exercise of discretion and a choice. The estate is an inanimate entity; it's decisions are made by and its actions taken by the trustee. The trustee had not even been appointed at the time of filing.

The trustee did not make the election to terminate the interest or give notice of the election to terminate the interest. The trustee certainly was not aware that it had done so. No election was made.

The filing does not constituted notice; nor notice in accordance with the Missouri statute

The court declares that debtor's filing of the bankruptcy petition constituted notice of the election to terminate the encumbrance and the termination of the encumbrance. The court does not explain why the filing constitutes notice nor how the filing complies with the requirements of the statute nor how the required contents of the written notice are met.

No authority.

The court cites no authority for the proposition that the bankruptcy filing constitutes election and notice of termination nor how or why notice is given. No Code provision is cited.

The Code specifies the effects, results, consequences of the filing of the bankruptcy petition in numerous provisions. None of these provisions provide for the election and notice proposed by the court. The court has cited to no such provision.

The lender must be made aware of the termination. This can not be retroactive.

Notice by its very nature requires that people be made aware of something. This is especially true regarding the termination of property rights that are constitutionally protected.. This is all the more true because petitioner was

obligated to perform the future services. Thus, he continued to perform services because he was never notified of the termination of his encumbrance interest in the real estate, but could have simply and easily been notified of this by trustee sending or delivering the proper notice.

Notice must be calculated to make the person who is to receive the information aware of the information. That this did not happen in this case is conclusively established by the facts.

1. Obviously, the trustee was not aware of the termination; if he were, he would have asserted this position to the petitioner, in his briefs in the bankruptcy court, in his brief and in oral argument in the district court, in his briefs and in oral argument in the court of appeals.
2. Obviously, the bankruptcy court also was not aware of the termination; if it were, it would have asserted the position in its opinion.
3. Obviously, the district court also was not aware of the termination; if it were, it would have asserted the position in its decision.
4. The petitioner certainly was not aware that the lien had been terminated by notice from the trustee regarding the interest of the estate in the real estate; to the contrary, petitioner had suggested to the trustee that he could terminate petitioner 's lien interest for future advances by giving notice.
5. The petitioner could not know that the present owner, the trustee on behalf of the estate, had made an election to terminate the encumbrance for future advances / obligations unless the trustee or the estate properly delivered a proper written notice stating that it had elected (made a choice) to terminate the encumbrance.

The foregoing constitutes a violation of due process and a retroactive taking of property.

No written notice; no mailing nor personal delivery; required contents were not met

What constituted the written notice?

How was the notice delivered to the petitioner? Notice certainly was not mailed by certified mail, return receipt requested. How and by whom was the written document personally delivered to the petitioner?

What did the written notice contain?

1. The written notice did not state with regard to what interest in the real estate the election was being made.

2. The written notice did not state who was the present owner of the interest in the real estate encumbered by the security instrument regarding which interest the election was being made.
3. The written notice did not state that an election had been made to terminate the security interest regarding such interest
4. The written notice did not state that the security interest was being terminated regarding future advances and obligations made or incurred after the lender received the written notice.

Conclusion

There was no notice. There is a violation of due process. The discretion of the trustee should not be removed.

Issues 24 & 25: Petitioner did not have to be employed by the estate to be compensated by the estate; petitioner had an application for compensation pending before the court

The appeals court held that petitioner had to be employed by the estate to receive compensation for his bankruptcy services. Petitioner is entitled to compensation for pre petition and post petition services from the estate without relying upon his the lien interest. The case is one of first impression for a court of appeals, but is contrary to the long-standing understanding of the legal profession, lower courts, and the Code.

Petitioner can be employed by the debtor without approval of the court. 2 MO. Bankruptcy Practice, section 9-4, page 9-5. *In Re Trinsey,* 115 B.R.828 (Bankr E.D. Pennsylvania 1990); *In Re Career Concepts, Inc.,* 76 B.R.830 (Bankr DC Utah 1983).

Previously in the Battis case, Bankruptcy Judge McDonald awarded petitioner compensation for post petition services from the estate without employment by the estate.

Petitioner also notes that in the present case Judge McDonald awarded petitioner compensation for pre petition services.

Prior to October, 1994, debtor 's counsel could be awarded compensation from the estate (without being employed by the estate) pursuant to section 330. *In Re Trinsey,* 115 B.R.828 (Bankr E.D. Pennsylvania 1990); *In Re Career Concepts, Inc.,* 76 B.R.830 (Bankr DC Utah 1983). Beginning in October, 1994, an amendment to section 330 was effective. This

amendment deleted authority for the court to award compensation pursuant to section 330.

However, section 503 (b) provides for compensation by the estate to debtor 's attorney. See *In Re Woodward East Project, Inc.*, 195 B.R.372, 374, Headnote 1 (Bankr E.D. Michigan 1996).

The test is whether the services benefited the estate. See *In Re Woodward East Project, Inc.*, 195 B.R.372, 374 and 376 Headnote 1, 2, and 6 (Bankr E.D. Michigan 1996). The Eighth Circuit has also ruled to the same effect.

Petitioner set forth in his brief, page 23, the services that benefit the estate and the amounts.

Thus, there was statutory authority for the awarding of compensation from the estate to the petitioner

Petitioner had an application for compensation pending before the bankruptcy court. Petitioner had designated the affirmative relief in response to the complaint as an application for attorney fees. If this was insufficient to require the court to decide the issue, trustee 's subsequent motion to review the attorney fees of the petitioner put the issue of compensation by the estate of debtor's attorney before the court. The statement of attorney fees was before the court including the fact that none had been paid. The compensation statement agreement between debtor and petitioner was before the court. Because of the foregoing, the bankruptcy rule 2016 (b) application requirements were met.

The bankruptcy court neither decided the motion to review the attorney fees of the petitioner nor petitioner 's application for compensation.

If for some reason, the application for compensation was required and not before the court, petitioner can file an application for compensation at any time including now and be compensated from the estate. However, the bankruptcy court has threatened petitioner with sanctions if he does so.

No legal basis

There was no possible basis for a conflict of interest with the debtor. Petitioner was not asserting his lien against the property of the estate. Rather, his position was that his lien interest for future advances / obligations was an interest in property and therefore was not property of the estate. There could not possibly be a conflict because nothing was being asserted regarding the property of the estate.

Debtor and petitioner had agreed that the petitioner would be paid from the real estate and would be paid prior to the taxing authorities.

There is no ethical violation under Missouri law. Even where the interest of the attorney conflicts with the interest of the client, any such conflict is permissible when the attorney reasonably believes that he can represent the client without any adverse effect and the client consents. Missouri rules of professional conduct, rule 1.7 (b). Asserting petitioner 's interest regarding the lien for future advances / obligations had no adverse effect on the representation of the client and client had consented.

(I note that there always is a "conflict of interest" with the interests of the client when the attorney is being paid or requests payment; especially, when the attorney is representing the client versus a creditor or a potential creditor that the client needs to pay or may need to pay. If this is the basis for the imposition of sanctions, then any attorney can be sanctioned at any time at the whim of the court. As noted below, the situation regarding the payment of the IRS was the same before the bankruptcy as after the bankruptcy; absolutely nothing had changed.).

As we have seen, there is no ethical violation under Missouri's rules. The bankruptcy court should not impose a sanction when there is no violation of the ethical standards of the jurisdiction. See *Sturgeon State Bank Vs. Perkey*, 194 B.R. 846 (Bankr WD MO.1996). The ethical rule of the jurisdiction applies unless the attorney is employed by the trustee or a debtor in possession. Nor is there any law that prohibits petitioner from asserting that he has a lien interest in the real estate regarding future advances / obligations. Missouri law specifically provides that petitioner has a lien interest in the real estate for future advances / obligations. The bankruptcy court should not impose a sanction when the action of petitioner

is not prohibited by law and the applicable law specifically provides that he has the interest that he is asserting. The trustee could have elected at any time to terminate the interest of the petitioner, but failed to do so.

However, the appeals court states that the Missouri ethical rule is not controlling, but that petitioner can't be adverse to the estate as set forth in section 327. *Perkey, supra* and *In Re Career Concepts, Inc.*, 76 B.R.830 (Bankr DC Utah 1983)are to the contrary. The purported operative conflict is with the debtor not with the estate. As noted below, the filing of the bankruptcy did not change the situation regarding the payment of the IRS and payment of the attorney relative to the debtor.

Section 327 is not applicable to the attorney for debtor in a chapter 7 liquidation case. *Perkey* and *Career, supra.* By its terms, congress did not state and did not intend that section 327 would apply to the attorney for the debtor in a chapter 7 liquidation case. The section only states that it applies to the employment of a professional by the trustee. All agree that petitioner was not employed by the trustee.. Section 327 is made applicable to the attorney for a debtor in possession in a chapter 11 case. Section 1107 makes section 327 applicable to professionals hired by a debtor in possession because section 1107 provides that a debtor in possession has the powers of a trustee. Only in this situation is section 327 applicable to an attorney for the debtor. Congress did not provide that section 327 applied to the attorney for the debtor in a chapter 7 liquidation case. No such authority can be found anywhere in the Code. Congress specifically stated who was included under 327. Thus, those not mentioned are excluded.

There is no reason why section 327 should be applicable to the attorney for a chapter 7 liquidation debtor. Section 327, with exceptions, prohibits a professional from being employed by the trustee or a chapter 11 debtor in possession when the professional is adverse to or not disinterested with respect to the estate. This makes eminent sense. The professional is directly and specifically handling the affairs of the estate and is responsible for the estate and its property. This rationale is not true regarding the attorney for a chapter7 liquidating debtor. His attorney is not directly responsible for the estate nor its property. Petitioner was not exercising the powers of a trustee. The trustee and his attorney were responsible for the estate and its property. The trustee is backed up by the U.S. trustee.

The attorney for the chapter 7 debtor may not have a conflict regarding the duties of the debtor to the estate. Section 521 sets forth the duties of the debtor to the estate. Petitioner does not have a conflict regarding the duties

of the debtor to the estate. This is the only basis upon which the attorney for the debtor in a chapter 7 case should be sanctioned for a conflict with the estate. Since these are duties of the debtor to the estate, if the attorney has a conflict with these duties, he has a conflict with the debtor. He also has a conflict with the estate since the duties are owed to the estate. However, the basis for the sanction is the conflict with the debtor.

Each and every case relied on by the courts is a chapter 11 case regarding a debtor in possession. This appeals court states that some of these cases are chapter 7 cases regarding the principles that they espouse. However, a close reading of the cases indicates that this is not correct. All of the cases are regarding representation and compensation in chapter 11 prior to conversion to chapter 7 at which stage the question of compensation was litigated. As previously explained, principles regarding the attorney for a debtor in possession under chapter 11 are not applicable to this chapter 7 liquidation. See comparison of chapter 11 and 7 in *Career*, supra. That court reaches the same conclusion.

The appeals court states that *Sturgeon State Bank Vs. Perkey*, 194 B.R. 846 (Bankr WD MO.1996) purportedly holds that section 327 is applicable to a chapter 7 case. The case did not so hold. There is no such statement in the case. The case is a chapter 11 debtor in possession case and therefore not applicable. That case said that when the attorney for the debtor in addition to being the attorney for the debtor was employed by the trustee or the debtor in possession, the attorney is then subject to section 327.

The appeals court has incorrectly declared the law. There is no authority that section 327 applies to a chapter 7 case nor is there any reason why it should apply to a chapter 7 case. The only provision in the code that could conceivably have any bearing on the attorney representing a chapter 7 debtor is section 521 as previously mentioned. Any conflicts of attorney with debtor regarding these duties should be handled in accordance with the ethical requirements of Missouri.

Attorneys must be given guidance and notice as to what the conflict of interest requirements are regarding the representation of a chapter 7 debtor. The determination of whether there is a conflict should be made in accordance with the ethical requirements of the jurisdiction and on a substantive and meritorious basis rather than by applying labels without analysis nor reason.

Factually, no possibility of conflict; any other conclusion clearly erroneous

A conflict with the debtor was factually impossible.

The estate had no possibility of funds with which to pay the IRS. The estate was extremely small. I will use rounded amounts. The net proceeds from the sale of the real estate was only $17,172. The exemption interest of the debtor was $8,000. The pre petition lien for tax services was $4,500. Pre petition bankruptcy services were awarded in the amount of $1,000. The balance is only $3,600. Petitioner was entitled to interest and protection / collection costs regarding the pre petition tax services that were granted in full. This amount was approximately $1,200. The balance is now $2,400. Pursuant to section 503 (b), Petitioner was entitled to compensation for post petition bankruptcy services in the minimum amount of $3,700. Pursuant to section 507 (b), this had a number one priority that is paid before other administrative expenses. The trustee may also have a number one priority claim pursuant to 507 (b). This amount, by itself, based upon the maximum permitted by statute may exceed the $2,400. See section 326. The trustee is entitled to other expenses. There was no possibility that the IRS would be paid from the estate.

Debtor wanted and intended that petitioner be paid first before the IRS. Debtor sought out petitioner to represent him regarding his tax problems. Debtor had no way to pay petitioner except from helped his real estate. To obtain representation, debtor proposed that petitioner take a mortgage against the real estate. Rather than taking a large straight deed of trust to ensure that petitioner was paid in full for any potential services that he would render, petitioner used an advance deed of trust that was in the best interest of the debtor. Debtor and petitioner discussed how the IRS would be paid. The only asset from which the IRS could be paid was the real estate. Debtor realized that petitioner would be paid from the real estate pursuant to his lien prior to the IRS.

During the representation of the debtor in the tax matter and before bankruptcy was even considered, petitioner became aware of the possibility that if the IRS made a jeopardy assessment, that the lien of the IRS would leapfrog over the lien of petitioner regarding future advances / obligations subsequent to the IRS lien becoming effective. Petitioner and debtor discussed this. Debtor agreed to give petitioner a straight deed of trust for $35,000 to ensure that petitioner was paid and paid before the IRS. Debtor

also consented to petitioner discussing this matter with the IRS. Petitioner was assured by the IRS that he did not have to worry about this matter.

Debtor was aware that petitioner would be paid before the IRS and this was what he wanted. Debtor had agreed and consented that petitioner would be paid first before the IRS. As a factual matter, it is impossible to have a conflict with the debtor when the debtor was aware that petitioner would be paid prior to the IRS and had agreed and consented to this arrangement.

The ethical rules of Missouri also confirm that this is not a conflict of interest. Rule 1.7 (b).

Petitioner did exactly what the debtor wanted. Debtor knew that petitioner was to be paid from his lien against the real estate and before the IRS. This was what the debtor had planned, proposed, and wanted. The primary reason was to ensure payment of petitioner and the continued representation of the debtor regarding the tax matters. The secondary reason for filing the bankruptcy was to preserve to the extent possible the value of the real estate to pay the IRS.

The debt of the IRS was non dischargeable and outstanding prior to the bankruptcy and petitioner was to be paid from the real estate before the IRS. The same was true after the filing of the bankruptcy. The filing of the bankruptcy and the prosecution thereof did not change the situation regarding the IRS. Petitioner's advance lien was valid and superior to the IRS prior to the filing of the bankruptcy. This advance lien prior to the filing of the bankruptcy was not found to be objectionable regarding the debtor or otherwise prior to the filing and was not objectionable after the filing of the bankruptcy. The only question was whether or not petitioner still had the interest in the real estate after the filing of the petition. The filing of the petition does not and did not change the relationship of the petitioner's lien regarding the real estate nor his contractual relationship with the debtor. Petitioner still had his lien interest after the filing of the bankruptcy.

Petitioner by asserting the lien interest against the non exempt interest was saving the exempt interest for debtor or to pay the IRS. (Petitioner 's lien was valid against the exemption interest of the debtor to the extent it was not effective regarding the non exempt interest or to the extent that the non exempt interest was insufficient to cover the lien.)

There are numerous other factual reasons why there was no conflict of interest. The foregoing is just some of the highlights.

Interest in property

Protection against incorrect concept

Petitioner was able to protect the legal community from the incorrect concept of property of the bankruptcy and district courts and the trustee. Their concept was that property of the estate is any "piece of property" in which debtor has an interest at the time of filing of the bankruptcy and therefore section 542 extinguishes all interests of others in the "piece of property". This concept presented a substantial detriment to the law and its application

Petitioner had a duty to ensure that this incorrect concept did not prevail and corrupt the law in the future. When incorrect law is declared it multiplies many times over in the future and spawns its own progeny.

Because of this reason alone, the appeal of petitioner could not the frivolous.

Introduction

The appeals court determined that the concept of equity determines what interests the debtor and the petitioner had in the real estate. The concept of equity does not determine what the interests are in the real estate, but is determined by the interests in the real estate. The interests in the real estate are determined by Missouri law. Pursuant to Missouri law, at the time of the filing of the bankruptcy petition, petitioner had a lien interest for future advances and obligations to the extent of $35,000. This interest could only be defeated by release of the lien by petitioner or election to terminate and proper notice by the debtor or a successor in interest to the debtor. These events have never occurred.

Mandate of congress

Section 541 (a) (1) determines what is property of the estate: "...all legal for equitable interests of the debtor *in* property as of the commencement of the case.)"

Appeals court incorrectly determined the law

The appeals court incorrectly determined that the interest in the real estate based on the purported federal concept of equity. This is contrary to its

earlier decisions and the decision of this court in *Butner* that interests in property are determined by state law.

Missouri law determines interest

Section 541 is the first step in determining what is property of the estate. However, the next step required is the determination of the interests in property according to state law. This step was skipped by the court.

What is a property interest and the extent of that interest is determined by state law. What is a property interest is not determined by federal law as suggested by the court. Nor does *Oxford Development* stand for this proposition. "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *In Re Oxford Development, Ltd.*, 67 F.3d 683, Paragraph 8 (8th Cir.1995) citing *Butner Vs. United States*, 440 U.S.48, 55 (1979). The controlling law of the Supreme Court is clear that state law determines the nature and extent of interests in property and therefore what becomes property of the estate.

The appeals court has previously made this determination itself. *In Re Garrott & Sons*, 772 F.2d 462 (8th Cir.1985). At paragraph 16, that court stated, "Thus, our focus is directed to consider what interests, if any, the debtors retained in the fund apart from the excess interest in 1983 and the exact nature of those interests." The court continued in paragraph 17, "Our inquiry must begin with state law for the Bankruptcy Code does not provide rules for deciding whether a debtor has an interest in any particular property. 4 COLLIER ON BANKRUPTCY ¶ 541.02[1] (L. King 15 ed. 1985). The nature and extent of the debtor's interest in property are determined by state law. Id. Property rights under section 541 are defined by state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979)."

Legislative history: Limitations on interests of debtor

As in *Butner*, the *Garrott* court realized the significance and impact of the legislative history. At paragraph 13, the court noted, "The legislative history makes note of the broad scope of the definition, but also makes clear that the definition was not designed to enlarge the debtor's rights against others beyond those existing at the commencement of the case." (emphasis mine) The court also stated at paragraph 16 in reference to its statement quoted above regarding the focus of the determination, "In light of our

discussion of section 541 and its legislative history suggesting that an interest limited in the hands of the debtor is equally limited in the hands of the estate...." Based upon the foregoing, it is obvious that the estate can not take any interest greater than the interest of the debtor and that such interest is subject to the obligations to which the debtors interest is subject.

Missouri law: summary

The interests of the debtor and the petitioner under Missouri law are clear and definitive. The interests held by the debtor and the petitioner in the real estate are determined by the advance lien statute, V.A.M.S. 443.055.

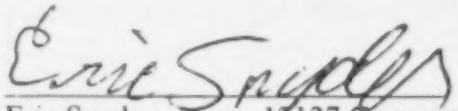
Missouri law is clear as to the nature and extent of the interest. Petitioner summarizes the law as follows. The deed of trust grants a security interest, lien, encumbrance in the property to the full extent of the face amount of the lien; i.e., $35,000 in this case. The face amount of the lien not only covers the amount of debt owed at any time, but also any future advances / obligations. The amount of debt owed at any time can be a floating amount and can be none. Despite this, the lien continues for the face amount of the lien and covers advances made and obligations incurred in the future. This is an obligation against the real estate. The lien for future advances and obligations is valid regarding and superior to the rights of all subsequent interest owners in the real estate such as purchasers, other transferees, and lenders. These rights are inherent in and the essential nature of a future advance / obligation lien. ("Regular liens" also encumber real estate regarding future matters such as interest and protection / collection costs. This is also true regarding the advance deed of trust and because of this, the amount encumbered may exceed the face amount of the lien.). The lien for future advances / obligations is complete, perfected , and final at the time of the recording. The grant is absolute and unconditional. The encumbrance can only be defeated by the release of the deed of trust or termination of the lien by election and proper notice pursuant to the statute.

This transfer of the security interest was made prior to the filing of the bankruptcy. Debtor as of the recording of the security agreement had obligated the real estate for future advances / obligations regarding "tax services" and "bankruptcy services". Petitioner was obligated to provide the services.

The real estate was subject to these obligations, these interests in the real estate, at the time of the filing of the bankruptcy. These interests did not become property of the estate.

The incorrect declarations of law of the appeals court must not be allowed to stand. They will cause havoc not only in the law of what constitutes property of the estate, but also regarding the law regarding what are interests in property.

Furthermore, they will have a substantial impact on lenders. For one thing, lenders will be less likely to use advance deeds of trust that are favorable to borrowers, but instead will take straight deeds of trust for significantly greater amounts. This is especially true regarding the present situation. They will also affect how lenders will proceed when the lienor files bankruptcy. Instead of being able to rely upon their liens, debtors and lenders will have to approach the bankruptcy court for orders to handle the situation. The property of the estate is protected since the estate can elect to terminate the lien as to future advances and obligations at any time.



Eric Snyder, pro se, 13127 Gascogne Ct., St. Louis, Missouri 63141-7317, 314-434--7462

Appendix

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United States Court of Appeals
FOR TIIE EIGHTH CIRCUIT

Nos. 97-1221/2300

In re: *

Bishweshwar Rai, *)Appeal from the United States
Debtor. *) District Court. for the
)* Eastern District of
Eric J. Snyder,. *)Missouri
Creditor - Appellant. *
*

A. Thomas Dewoskin,
Trustee - Appellee. *

Submitted: September 10, 1997
Filed: December 17, 1997

Before BEAM, FLOYD R GIBSON, and HEANEY, Circuit Judges.

FLOYD R GIBSO$, Circuit Judge.

These appeals arise from a District Court' Order entered November 26, 1996 which affirmed the Bankruptcy Court[2] Order dated May 6,1996 that granted judgment in favor of Appellee. Thomas Dewoskin ("Trustee") and against Appellant Eric J. Snyder. Snyder also appeals the District Court Order of March 3, 1997 which sanctioned Snyder for his frivolous appeal to the district court. For the reasons set forth below, we affirm these orders.

I. BACKGROUND

On September 22, 1994, Bishweshwar Rai Mahendra ("Debtor") and Snyder executed a Representation Agreement (the "Agreement"). In pertinent part, the language of the Agreement provided:

1. WHEREAS, [Debtor] may not have filed income tax returns with either the IRS or the State of Missouri for the years, 1987, through and including 1993; and

2. WHEREAS, [Debtor wishes to have [Snyder] represent him, but does not have the present cash with which to pay [Snyder]; and

3. WHEREAS, [Snyder] is willing to represent [Debtor] based upon [Debtor's] proposal to give him a Second Deed of Trust in the property.

17. [Snyder] agrees to represent [Debtor] regarding his income tax returns for the years 1987 through and including 1993 both before the

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'The Honorable Donald 3. Stohr, United States District Judge for the Eastern District of Missouri

4he Honorable David P. McDonald, United States Bankruptcy Judge for the Eastern District of Missouri.

Internal Revenue Service and before the Missouri Department of Revenue.

Snyder's App. at 100, 103. Debtor also signed a Promissory Note (the "Note") in favor of Snyder for '[a]dvances up to *$35,000."* a at 105. This Note was for Snyder's "legal services" to be performed on behalf of Debtor. a Debtor further executed a Deed of Trust' that pledged his real property located in DeSoto, Missouri (the "property" or "real property") to Snyder as security for the Note.

On November 28, 1994, Debtor filed his voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Snyder served as Debtor's attorney of record. Snyder did not file an application to be employed on behalf of the bankruptcy estate or an application for compensation. Regarding the fee arrangements between Snyder and Debtor with respect to

the bankruptcy. Snyder stated that "we considered [the bankruptcy] to be a continuation of the criminal representation [regarding the tax matters. The] method paying... was [that] I was to be paid from the proceeds of the sale of his house." Snyder Dep. at 6. As of the date of the bankruptcy filing, Snyder was a pre-petition creditor of Debtor. Snyder recognized that he might have a conflict of interest with the bankruptcy estate. See Id. at 12-13.

'The Deed of Trust provided in pertinent part:

[Debtor] has executed a Note to secure future advances for legal services and costs provided by [Snyder to Debtor]. Such parties have entered into a Representation Agreement whereby [Snyder] agrees to provide certain legal services and [Debtor] . . . has agreed to pay for such legal services by executing a Note for such legal services and costs and by securing the Note by this Deed of Trust.... This security instrument is governed by V.A.M.S. Section *443.055.*

id at 109.

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On April 28, 1995, Trustee closed the sale of Debtor's real property in DeSoto for the purchase price of$165,500. After priority claims were paid, Trustee deposited the sum of $17,171.64 into the bankruptcy estate's bank account. Snyder sought compensation from the sale proceeds of the real property for legal services in the amount of $13,484.68. Snyder maintained that he was entitled to compensation for his services rendered both pre-petition and post-petition.[4]

Trustee filed a Complaint to Determine the Validity, Priority, and Extent of the Lien on June 6, 1995; a Motion for Review of Attorney Fees on July 20, *1995;* and a Motion for Imposition of Sanctions Pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure on August 31, 1995. These motions named Snyder as the defendant in each matter. The parties 'submitted"[5] these contested matters to the bankruptcy court pursuant to uncontested facts, Snyder's Motion for Summary Judgment, and legal briefs.

On May 6,1996, the Bankruptcy Court entered an Order determining that: (1) to the extent Snyder's lien was valid, it did not cover representation beyond tax matters

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[4]Snyder claims that Debtor and he modified the Agreement by orally agreeing that it extend to bankruptcy services. Snyder and Debtor memorialized this modification with a compensation statement, Amended Promissory Note, and Amended Deed of Trust. In addition, Snyder contends that the bankruptcy services were also independently covered within the scope of the original Agreement. See Snyder's Br., No. 97-1221, at *15.*

'5Snyder claims that neither party consented to "submission" of the case and that the parties never agreed to the facts. After reviewing this issue, we find Snyder's contention to be without merit By submitting a motion for summary judgment, Snyder stated that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material frt." Fed. R. Civ. P. 56; see also Fed R. Bankr. P. *7056.* Therefore, by submitting his motion for summary judgment and stating that no genuine issue of material fact existed, Snyder agreed to submit the case.

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set forth in the Agreement; (2) to the extent that Snyder's lien was valid, it was extinguished on the petition date with respect to any fUrther fUture advances; (3) Snyder was not entitled to receive compensation from the assets of the estate for post-petition legal services; (4) legal services rendered for pit-petition tax and other non-bankruptcy matters would be awarded in the amount of $4,348.80; and (5) compensation for legal services rendered for pre-petition bankruptcy matters would be awarded in the amount of $1,000 but reduced by the same amount as sanctions for Snyder's conflict of interest' The bankruptcy court entered this order without a hearing or trial. This order also did not award interest on the pre-petition lien nor any protection and collection costs.

On June 24, 1996, Snyder filed his Notice of Appeal to contest the Bankruptcy Court's Order. On November *25,* 19%, the District Court entered its Judgment affirming the Bankruptcy Court's Order in its entirety. Snyder filed his Notice of Appeal to this court on December 26, 1997.

On January 9, 1997, Trustee filed a Motion for Sanctions against Snyder pursuant to Fed. R. Bankr. P. 9011 for Snyder's alleged frivolous appeal to the district court. Snyder did not file a response. On March 3, 1997, the District Court entered an Order assessing sanctions against Snyder in favor of Trustee in the amount of $4,352.80. The district court denied Snyder's request to set aside this order on March 17,1997. Accordingly, Snyder also

appeals to this court arguing that the district court erred in assessing sanctions against him for filing an alleged frivolous appeal.

'The apparent conflict of interest arose from Snyder's assertion of a lien which would decrease the amount of back taxes Debtor paid to the Internal Revenue Service out of the estate. As a creditor of the bankruptcy estate, the larger the amount of attorney fees that Snyder would have received would leave less estate funds for distribution to the taxing authorities and a larger non-dischargeable debt claim for Debtor.

II. DISCUSSION

In a case originating in bankruptcy court, the court of appeals functions as a second court of review and reviews the bankruptcy court's conclusions under the same standards that the district court applied. We review the bankruptcy court's findings of fact under the clearly erroneous standard and consider legal issues de novo Gourley v Usery *(hi re* Usery), 123 F.3d 1089, 1093 (8th Cir 1997).

A. The Unencumbered Portion of Dlebtor 'is Real Prnnerty Became Estate Prnnerty on the Petition Date.

Snyder argues that the bankruptcy court erred as a matter of law in finding that 11 U.S.C. § 542 (1994) extinguished his lien interest. Snyder also contests Trustee's position that 11 U.S.C. § 541 (1994) extinguished Snyder's lien interest. Snyder maintains that his right to be secured as to future advances and future obligations constitutes a present lien on Debtor's property. Snyder claims that, under Mo. Rev. Stat. § *443.055.2* (1994), his lien embodied the full extent of the face amount of the security instrument for future advances and obligations at the time the security instrument was created. Here, the Deed of Trust's 6cc amount is $35,000 and was established on September 22, 1994. Therefore, Snyder concludes that this lien existed prior to the commencement of the bankruptcy filing-November 28,1994-and that the bankruptcy estate takes its interest in the Debtor's real estate subject to Snyder's interest, regardless of how much Debtor owed Snyder on the petition date. We disagree.

Determining whether an interest is part of the bankruptcy estate requires a three-part quay. First, the court must decide whether tbe item constitutes "property" under § 541(aXl). **See** C.T. Dev. Corp. v. Barnes *(In re* Oxford Dev., Ltd.), 67 F.3d 683, 685(8th dr. 1995). Second, the court should look

to state law to ascertain the debtor's interest in the property because "[property interests are created and defined by state

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law., . [u]nless some federal interest requires a different result." Id. (quotation and citation omitted). Third, the court must find that the debtor had the property interest at the time of filing the bankruptcy petition. See Davis v. Moon *(In re* Usely) 158 BR. 470,472 (Bank W.D. Mo. 1993).

Under § 541(a)(1) the bankruptcy estate consists of all of the debtor's legal and equitable property interests that existed as of the time that the bankruptcy petition is filed. **5cc** § 541(a)(1) The property of the bankruptcy estate is broadly defined by §541(aXl). **5cc** United States v. Whiting Pools.. Inc., 462 U.S. 198, 204-05 (1983). "Any potion of a debtor's property that is unencumbered by mortgage--the equity—is part of the bankrupt's estate." United States v Rawer, 963 F.2d 1332, 1337 (10th Cir.), ~czL4cnicd, 506 U.S. 886(1992).

Pursuant to § 541, Debtor's legal and equitable interests in the real property became property of the estate as of the petition date. Thus, the estate possessed Debtor's unencumbered portion, or Debtor's equity, in the property. At that point, Debtor lost the right to authorize Snyder's legal services which could potentially further encumber this asset of the bankruptcy estate. Only the bankruptcy court could control the further encumbrance of the estate property. Neither Debtor nor Snyder sought or obtained the bankruptcy court's approval to continue to draw upon the future advance clause contained in the Agreement, Note, and Deed of Trust. To the extent that Debtor and Snyder have attempted to continue to draw upon the future advance clause after the petition's filing, such attempts constitute unauthorized post-petition transfers pursuant to 11 U.S.C. § 549(1994). "the trustee may avoid a transfer of property of the estate ... that occurs after the commencement of the case; and... that is not authorized.. by the court." 11 U.S.C. § 549; see also Brown v. Harris *(In re* Auxanor Inc4 96 B.R. 957,960 (Bankr. W.D. Mo. 1989) ("Taking a security interest in real estate is a 'transfer' as that term is defined in 11 U.S.C. Section 101(50).").

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Turning to Missouri state law's determination of the extent of Debtor's interest in the property, Snyder misapprehends § 443.055's effect in the present case. Section 443.005.1(1) defines "borrower" to include a "successor in interest" to the "mortgagor, deed of trust grantor, or debtor." Section 443.055.6 allows the owner of the interest in the real property

encumbered by the security instrument to give notice to the lender, electing to terminate the operation of the instrument as security for future advances made or incurred after the date the lender receives notice. We find that the filing of Debtor's bankruptcy petition, in the present case, comported with § 443.055.6's notice requirement to Snyder and effectively terminated die operation of the Note and Deed of Trust as security for future advances incurred after the date of filing the bankruptcy petition. Here, Snyder himself prepared and filed Debtor's bankruptcy petition and, thus, had actual notice of Debtor's relinquishment to the estate of his interest in the real property. Moreover, the Trustee, as the representative for the bankruptcy estate and successor in interest to the real property, did not authorize any fUrther legal services to be performed by Snyder.

Such a result is analogous tote legal effect of a cash security retainer. Snyder's security agreement with a future advance clause, like a cash security retainer, was held by Snyder to secure payment of professional fees and costs yet to be rendered. Under the ethical rules applicable in most jurisdictions, the security retainer monies remain property of the client until counsel applies them to legal services actually performed. 5~ Indian Motocycle Assocs. III LUI Partnership v. Massachusetts Hous. Fin. Agency 66 F.3d 1246, 1255 (1st Cir. 1995). The debtor's equitable interest in the unearned portion of the retainer becomes property of the estate upon the filing of the bankruptcy petition. 5cc **Id.** To withdraw the retainer, counsel is required to file a fee application with the bankruptcy court pursuant to 11 U.S.C. § 330(1994), and the court could require the debtor's counsel to surrender the unearned portion as "property of the estate" pursuant to § 542. 5cc Id.; aseealso Meeker v. Germeraad *(In re* Onincy Air Cargp.Inc., *155* B.R. 193, 197 (Bankr. C.D. III. 1993) (security interest in property as a "security retainer" was estate property which can only be used by the professional

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upon compliance with the entire fee application process, including court approval); *In re F*itzaimmontlmddnglng., 124 B.R. *556,* 560 (Bankr. Minn. 1991) (an attorne9s retainer held in trust is property of the bankruptcy estate).

In sum, at the time of filing the bankruptcy petition, Debtor still retained equity in the portion of the real estate unencumbered by Snyder's post-petition legal services. The filing of the petition transferred Debtor's equity in the real estate to the bankruptcy estate. Although we find that § 541, as opposed to § 542 (as the bankruptcy court found), is the more appropriate

section for evaluating the relevant property interests, we affirm, under § 54 l's three-pan quay, the bankruptcy courts and district court's conclusions that the unencumbered portion of Debtor's real property became estate property on the petition date. See Cooksey v. Delo, 94 F.3d 1214, 1218 (8th Cit 1996) (appellate court may affirm on any basis supported by the record).

Snyder Is Not Entitled to Receive Comnensation From the Rttpe's Asset for His Post-Petition Legal Services.

Snyder's contention that he is entitled to compensation for his post-petition legal services rests primarily on his belief that his lien interest was not extinguished by Debtor's filing of a bankruptcy petition because these legal services constituted future advances pursuant to § 443 .055.~ However, we reject this argument. As we explained supra in Section A of this Opinion, Snyder's lien-to the extent it was valid-was extinguished on the petition date with respect to any fixture advances. Snyder's only

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Snyder also argues, in the alternative, that the Agreement with Debtor constitutes an executory agreement because, if Snyder is not secured for his post-petition services, then Debtor has not fully performed the contract on Debtor's part. After carefully considering this issue, we find it to be without merit. Snyder further claims that Snyder and Debtor orally amended the Agreement to cover bankruptcy services. However, whether Snyder and Debtor orally amended the Agreement to cover bankruptcy matters is irrelevant because Snyder's lien was extinguished on the petition date and does not secure any post-petition legal services.

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avenue for post-petition compensation would have been to seek such compensation pursuant to § 330 as an administrative expense. See *In* it Quincy Air Cargo Inc., 155 BR. at 197 (professional must comply with entire fee application process, including court approval, in order to be paid from estate property even when the professional has a lien on such property).

Here, Snyder did not seek permission to be employed by the estate, and no officer of the estate asked Snyder to perform services on behalf of the estate. In fact, Snyder would not have been eligible to be employed by the estate because he is not "disinterested" in accordance with 11 U.S.C. § 327(1994).

8cc Pierce v. Aetna Life Ins. Co. *(In* it Pierce), 809 F.2d 1356, 1363 (8th Cir. 1987) ("[Ujnder Section 327(a),
~ becabse the attorney holds an 'interest adverse to the estate.' 11 U.S.C. § 327(a).... lAn attoorney's pre-petition mortgage on the debtor's real estate constitutes an 'adverse interest under Section 327(a)."). Therefore, because denial of compensation is within the courts discretion, see Id.; 11 U.S.C. § 328(c) (1994), and because we perceive no abuse of discretion, we affirm the bankruptcy court's and district court's decisions that Snyder is not entitled to compensation for services rendered post-petition.

C The Rankn~ptcy Court Did Not Err in Awarding Snyder Comnensation in

Snyder argues that the bankruptcy court erred by (1) only awarding him $4,348.80 for his pre-petition nonbankruptcy legal services; (2) not awarding him interest and protection/collection fees and costs under 11 U.S.C. § 506(b) (1994); and (3) not attaching his lien, to the extent it is valid, to Debtor's $8,000 homestead exemption in the real property. We disagree.

First, we find no reason to disturb the bankruptcy courts finding of fact that Snyder was entitled to $4,348.80 for pre-petition tax work. Snyder's time records

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reflect this amount and support that the bankruptcy court did not clearly err in awarding this sum. We also affirm the bankruptcy courts conclusion that Snyder's lien in the real property was limited to the pre-petition tax services as the plain language of the Agreement so stipulated. **5cc** Snyder's App. at 103, ¶ ¶ 1-3, 17.

Second, we find that the bankruptcy court did not err in ref using to award Snyder interest and protection/collection costs on his pre-petition lien despite the Note and Deed of Trusts provision for such costs. The Bankruptcy Code provides that

(a) Any attorney representing a debtor in a case under this title, or in connection with such a ~,... shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition. ...

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement.

11 U.S.C. § 329 (1994). Section 329 requires the attorney to show that the agreed compensation for the legal services is reasonable. See In re Rheuban, 121 Bt 368, 385 (Bank CD. Calf 1990). We conclude that § 329 authorized the bankruptcy court to award Snyder the fee it deemed appropriate for the pre-petition legal services performed in connection with Debtor's bankruptcy proceeding regardless of the existence of the Agreement, Note, and Deed of Trust and the provision for interest and protection/collection costs. Accordingly, because Snyder has failed to make the required showing we find that allowing Snyder any further compensation would exceed the reasonable value of his services.

Third, we turn to the issue of Snyder's claimed interest in Debtor's homestead exemption. As of the petition date, the rights in Debtor's exemption were determined. 5cc Annstrong v. Peterson *(In re* Peterson), 897 F.2d 935, 937 (8th Cir. 1990). Neither party disputes that Debtor was entitled to an $8,000 homestead exemption

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pursuant to Mo. Rev. Stat. § 513.475 (1994). However, Snyder apparently contends that Debtor's homestead exemption is valid against all creditors except Snyder. We disagree. Pursuant to Fed. R. Bankr. p. 4003(b), the trustee and creditors have the right to object to the claimed exemptions within thirty days after the conclusion of the first creditors' meeting. Unless such an objection is filed, the property claimed as exempt by the debtor is exempt. See in re Stanley, 143 B.R. 900, 903 (Bankr. W.D. Mo. 1992). In the present case, the first meeting of creditors concluded on December 31, 1994; therefore, Snyder is time-barred from objecting to Debtor's homestead exemption as applied against Snyder.

a *The Ranknptcy Court Did Not Err in Awarding Snyder £1000 for Pre-netition Ranknrntcy Matters and iq Reducing This Award In the Same Amount Recause of Snyder¶s Conflict gf Interest with the Debtor.*

From our best analysis of Snyder's convoluted argument, we discern that Snyder contends that the bankruptcy court erred in only awarding him $1000 in compensation for his pre-petition bankruptcy services. Apparently, Snyder claims that a majority of his pre- and post-petition bankruptcy services also constitute "tax matters," are reasonable and necessary expenses, and are secured by the Note and Deed of Trust as Snyder has

previously argued. Therefore, pursuant to the Bankruptcy Compensation Statement that provides that Snyder be paid at the rate of $120 per hour, Snyder claims that he should have received compensation based on this hourly rate. However, we find Snyder's argument to be without merit.

As already discussed, we determined that Snyder's lien was only valid as to his pre-petition tax services. The bankruptcy court properly concluded that any other non-tax services constituted unsecured pre-petition debt. The bankruptcy court, under §329(a), had the power to review Debtor's transactions with his attorney Snyder. If the bankruptcy court found that such compensation paid or promised to be paid to the attorney exceeded the reasonable value of such services, the court could cancel any

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such agreement or order the return of any such payment to the extent the payment was excessive. 5cc § 329(b). Considering the lack of complexity and the customary legal fees that are awarded in this community for planning, preparing and filing the necessary schedules and petition for a Chapter 7 case, the bankruptcy court did not err in awarding Snyder $1000 as a reasonable fee for his pre-petition bankruptcy services.

Snyder also disputes the bankruptcy court's imposition of sanctions against him in the amount of $1000 for a conflict of interest with Debtor pursuant to Rule 9011. Snyder contends that the bankruptcy court never informed him of this apparent conflict of interest and never gave Snyder an opportunity to defend against this charge, which allegedly violated Snyder's due process rights. Snyder also contests the court's finding that a conflict of interest existed.' Once again, we disagree.

First, we find that Snyder did have notice that the bankruptcy court could potentially award sanctions against Snyder for a conflict of interest with Debtor. At the August 24, 1995 hearing before the bankruptcy court, Trustee informed the court and Snyder that he was "ivestigat[ing] whether grounds exist to file a motion for

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'Snyder also argues that, as the attorney for a debtor in a Chapter 7 case as opposed to an attorney for the estate or a debtor-in-possession, the Bankruptcy Code's ethical standards should not apply to him. However, we reject this position. As we previously determined, upon filing of the bankruptcy petition, the unencumbered portion of Debtor's real property became estate property. Therefore, Snyder must comply with the applicable Code guidelines in order to receive compensation for his post-petition legal

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services from estate assets. See *In re* Independent Sales Corp. 73 B.R. 772, 774-775 (Bankr. S.D. Iowa 1987) (noting that a retainer obtained by the debtor's attorney prior to filing the petition for relief is held in trust to the extent it is for services to be rendered during the case and until allowed by the court and ordered paid pursuant to sections 330 and 331, and further indicating that section 330(a) applies to a Chapter 7 case). See in re Sturgeon State Bank v. Perkey *(In re* Perkey) 194 B.R. 846, 849-50 (Bankr. W.D. Mo. 1996) (finding, in a Chapter 7 case, that the debtor's attorney must satisfy both the ethical requirements set forth in the Model Rules of Professional Conduct and § 327 of the Bankruptcy Code).

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sanctions." Bankr. Hr'g Tr. of August 24, 1995 at 6. On August 31, *1995,* Trustee filed a Rule 9011 Motion for Imposition of Sanctions. Finally, Snyder himself admitted in his deposition that he might have an adverse interest with the bankruptcy estate. See Snyder Dep. at 12-13. Therefore, as Snyder clearly had notice and an opportunity to defend against the potential sanctions charge, Snyder's due process rights were not violated.

Turning to the propriety of the bankruptcy courts $1000 sanction against Snyder for his conflict of interest, Rule 9011(a)[9] provides:

Every petition. . . filed in a case under the Code on behalf of a party represented by an attorney... shall be signed by at least one attorney of record.... The signature of an attorney or a party constitutes ... that to the best of the attorney 's... knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it... an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

The language of Rule 9011 closely tracks the language of Fed. R. Civ. P. 11, and cases interpreting Rule 11 are applicable to Rule 9011 cases. See (3n,newaldt v. Mutual Life Ins. Co. of New York *(In re* Cannes Ranch Inc.), 7 F.3d 740, 742 n.4 (8th Cir. 1993). "[Tihe established standard for imposing sanctions is an objective determination of whether a part)'s conduct was reasonable under the circumstances." In re Armwood,

[9]We note that Rule 9011 was amended on April 11, 1997, with the amendments having an efiective date of December 1, 1997. Sm 28 U.S.C. 2075, H.R.Doc. No. 70, 105th Cong., 1st Sess. 87-96(1997). Because the relevant sanction orders arose under former Rule 9011, amended Rule 9011 does not have implications in the present case.

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175 B.R. 779,788 (Bankr. N.D. Ga. 1994). "We apply an abuse-of-discretion standard of review in all aspects of Rule 11 (and by analogy, Rule 9011) cases." In re Coones ranch,7F.3dat743.

Applying these standards, we conclude that the bankruptcy court did not abuse its discretion by sanctioning Snyder for his conflict of interest with Debtor. As we previously noted, Snyder's security interest was limited to the value of his pre-petition legal services for tax matters. Snyder's assertion that his lien extended to other matters was not supported by the law or a good faith argument for its modification or reversal. When Snyder argued that his lien extended to his other non-tax services, Snyder's interests directly conflicted with Debtor's interest to pay his non-dischargeable claim to the Internal Revenue Service. It is appropriate to deny or reduce compensation to a professional that represents a party (here, Snyder represented himself as a creditor of Debtor) who has an interest adverse to the bankruptcy estate. see in re Pierce, 809 F.2d at 1362-63. Therefore, we find that the bankruptcy court did not abuse its discretion in sanctioning Snyder for a conflict of interest as Snyder's actions were not reasonable under the circumstances.

F. The District Court Did Not Err in Sanctioning Sn vder for His Frivolous Appeal

Snyder argues that the district court erred in sanctioning him for his alleged frivolous appeal to the district court, in part,10 because Trustee's motion failed to comport with Rule li's requirement that the motion specifically describe the conduct alleged to have violated such rule, and the district court's order failed to make sufficiently detailed findings of fact and conclusions of law. In addition, Snyder asserts

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10~Snyder also attempts to characterize Trustee's motion and the district court's order as a "motion and order for attorneys fees and costs" as opposed to a "motion and order for sanctions." However, we reject this

argument as completely lacking any merit and not warranting further discussion.

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that his preceding legal arguments demonstrate that the appeal was not frivolous. We disagree.

In the present case, Trustee submitted to the district court a seven page legal brief entitled "Suggestions in Support of Motion for Sanctions." This brief detailed that Trustee was pursuing sanctions against Snyder, pursuant to Rule 9011, because the appeal was not grounded in fact nor by existing law or a good faith argument for an extension, modification, or reversal of the existing law. The Trustee's brief, in. short, highlights Snyder's conflict of interest in representing Debtor and in attempting to apply his lien to the non-tax and post-petition legal services. As such, we find that Trustee's motion and brief fully comply with Rule 9011's specificity requirements.

Similarly, we conclude that the district court did not abuse its discretion in panting Trustee's unopposed motion and sanctioning Snyder in the amount of $4,352.80 for Trustee's attorney fees and double costs in defending the frivolous appeal in the district court. Although a more thorough analysis might be illuminating, the district court order adopted Trustee's rationale for the imposition of sanctions by implication and provided Snyder with sufficient notice of the rationale underlying the sanctions. In this case, the district court did not abuse its discretion as sanctions were appropriate because Snyder's appeal was not supported by the evidence nor in conformance with applicable law, nor a good faith argument for its extension, modification, or reversal. As our disposition in this case reveals, Snyder still appears to not understand the law applicable to his case. Therefore, we affirm the district court's order sanctioning Snyder for his frivolous appeal.

IIL CONCLUSION

We have carefully examined each of the remaining contentions raised by Snyder on appeal and find them to be without merit. For the reasons set forth in this opinion, we affirm the bankruptcy court order and district court orders. In addition, we note

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Trustee's request, see brief of appellee at 34 (No. 97-1221) and 12 (No. 97-2300), that we sanction Snyder further in the amount equal to the

attorney fees and costs incurred by the bankruptcy estate in defense of Snyder's frivolous post-judgment motions and appeal to this court. Pursuant to Rule 38 Fed. R. App. P., we must provide reasonable notice to counsel that we are contemplating sanctions and give counsel an opportunity to respond. See id. (the 1994 Advisory Committee Notes indicate that a statement in a party's brief moving for sanctions does not provide sufficient notice). Therefore, Snyder shall submit a response to the question of the propriety of sanctions imposed by this court against him to the clerk of this court within fifteen days of the date of this opinion. Trustee shall also submit to the clerk of this court within fifteen days an accounting of attorney's fees and costs incurred in this appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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Appeal court order of 3/3/98

United States Court of Appeals
for the eighth circuit

No. 97-1221/2300EM

In re: *

Bishweshwar Rai, *)Appeal from the United States
Debtor, *) District Court, for the
)* Eastern District of
Eric J. Snyder,. *)Missouri
Creditor - Appellant, *
*

A. Thomas Dewoskin,
Trustee - Appellee. *

The court denies Mr. Snyder's request for (1) additional time to file a "complete response" to the issue of sanctions against him for a frivolous

appeal to this court and (2) an extension of the stay of mandate. The court Ms already granted Mr. Snyder two extensions to file his response to the propriety of sanctions issue as well as stayed the mandate on two occasions. Because Mr. Snyder Ms offered no proper reason to justify his behavior in this case, any further extensions are unwarranted.

Regarding the merits of whether or not Mr. Snyder should be sanctioned for a frivolous appeal to this court, the court awards the trustee sanctions and costs in the amount of $7,093.79, representing the trustee's fees and costs associated with the defense of Mr. Snyder's frivolous post-judgment motions and appeal to this court. San Fed. R. App. p. 39. Although a party has the
right to appeal where a good faith argument *for* the position exists, the court must draw the line where counsel places his own *interests* over his client's and continually advocates a position wholly lacking in merit. Mr. Snyder's continued assertion of a lien on the debtor's exempt assets illustrates Mr. Snyder's conflict of interest with his client.

March 3, 1998

order entered at the direction of the court:
S / Michael E Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

Judgment of district court, 11/25/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
Bishwesawar Rai Mahendra	)	
Eric J. Snyder,	)	Case no. 4:95CV1459D
Appellant	)	
vs.	)	
A. Thomas DeWoskin,	)	
Respondent	)	

JUDGMENT

Appellant is an attorney f or the debtor in bankruptcy. Before the Bankruptcy Court, th.e trustee filed a Complaint to Determine the Validity, Priority and Extent of Lien concerning appellant`s lien on certain real property of the debtor, a Motion f or Review of Attorney Fees and a Notion for Imposition of Sanctions. The appellant/attorney appeals *from* **the** Bankruptcy Court`s May 6, 1996 memorandum opinion and order ruling on the complaint and motions, and from the Bankruptcy Court`s June 7, 1996 order denying appellant`s motion for amendment and to make additional findings of fact. Having reviewed **the** record and the parties` briefs, and having heard oral argument on **the** matter, the Court concludes that all the challenged rulings of the Bankruptcy Court are correct. flg 8th Cir. Rule 47 B. Accordingly,

it is here by court, judged, and decreed that the Bankruptcy Court`s May 6, 1996 and June 7, 1996 orders areaffirmed.

It is further order that appellee `s motion to strike (document no.18) is granted.

S / D J Stohr, united states district judge

dated:11/25/96

District court frivolous order, 3/3/97

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
Bishwesawar Rai Mahendra	)	
Eric J. Snyder,	)	Case no. 4:95CV1459DJS
Appellant	)	
vs.	)	
A. Thomas DeWoskin,	)	
Respondent	)	

ORDER

Appellee, trustee in bankruptcy for debtor Mahendra, has filed a motion for sanctions seeking an award against appellant Snyder equal to appellee's attorney's fees and twice his costs incurred in defending against the instant appeal. The amount of fees and costs has already been approved as reasonable and necessary by the bankruptcy court in its order of January 6, 1997, allowing compensation from the bankruptcy estate. Appellee's unopposed motion appears to be well taken, in that Snyder's appeal was not well grounded in fact and not supported by existing law or a good faith argument for modification of existing law, and the sanctions requested would alleviate a portion of the detriment to the bankruptcy estate which Snyder's conduct and litigation have caused. Accordingly,

IT IShereby ORDERED that the trustee/appellee's unopposed motion for sanctions [Doc. #311 is granted, and trustee/appellee is awarded as against appellant Eric J. Snyder sanctions in the total amount of $4,352.80, representing attorney's fees of $4,05B.50 plus double coats of $147.15 incurred in the defense of Snyder's frivolous appeal.

S / D J Stohr, united states district judge

dated:3/3/97

Bankruptcy court opinion of 5/6 /96

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

n re:

Bishwesawar Rai Mahendra	)	Case No.94—46400—293
Debtor.	)	Chapter 7
	)	
A. ThOMAS DeWOSKIN, TRUSTEE,	)	)

Plaintiff,

)

ERIC J. SNYDER,)

Defendant.) Adv. No. 95—4548—293

Memorandun Opinion

jurisdiction

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. 55 1334, 151, and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" pursuant to 28 U.S.C. 5157(b) (2) (E) and (K), which the Court may hear and determine.

Procedural background

The Debtor, Bishweshwar Rai Mahendra, filed his voluntary Chapter 7 petition on November 28, 1994, which was prepared by his attorney, Eric 3. Snyder. Thereafter, the United States Trustee withdraw for the Eastern District of Missouri appointed A. Thomas Dewoskin as Trustee in this case. Upon application of the Trustee, the court authorized Mr. DeWoskin to retain Robert E. Eggmann as his attorney.

The instant complaint warn filed by the Trustee against Mr. Snyder seeing this Court to determine the validity, priority and extent of the Defendant' s lien on the proceeds of the sale of the Debtor's property located in DeSoto, Missouri, and specifically to find that:

a. Defendant's lien as to post petition service is not valid; and

b. Defendant's lien as to pre-petition service is valid only to the extent he performed actual and necessary services for which he would be entitled to compensation.

Mr. Snyder filed his answer denying the Trustee's assertion and raising the following affirmative defenses:

8 • Even if a lien interest in the real property was not created for the full $35,000 of advances subject to defeasement; and in addition even if the Bankruptcy filing destroyed the lien regarding future advances, pursuant to the pre-petition contract, the Defendant is still entitled to compensation because of the following:

A. Debtor claimed an $8,000 exemption in his homestead, the real property. The exemption portion is no longer in the Bankruptcy estate. Defendant's lien continues as to such property and is not destroyed.

3 • If Defendant does not have a property interest to the full extent of the $35,000 lien in the real property because the contract between the Debtor and the Defendant has not been fully executed by the Debtor and the contract is an executory contract, Defendant is entitled to compensation for his legal services until such contract is rejected.
C. Even if post petition services rendered by the Defendant do not constitute a lien interest against the real propertyg a significant portion of the post petition services of the Defendant are regarding the administration of the Bankruptcy estate and therefore these fees are compensable as an administrative expense of the estate.

The Trustee denied that the attorney fee contract between Debtor and Defendant constitutes an executory contract and denied that the Defendant is entitled to any compensation from the bankruptcy estate as an administrative expense claim. Snyder did not file an application to be employed on behalf of the bankruptcy estate or an application for compensation.

Subsequently, Snyder filed a Motion For Summary Judgment. The parties agreed to submit this case on the record without testimony.

Factual background

Upon consideration of the briefs and the record, the Court makes the following findings of fact.

1. Snyder began his initial representation of Mr • Mahendra on september 15, 1994 regarding the IRS criminal investigation of Mr. Mahendra.

2. On September 22, 1994, the Debtor and Snyder executed a Representation Agreement whereby Snyder agreed to act as attorney for the Debtor. The Agreement provides in part:

1 • WHEREAS, Client may not have filed income tax returns with either the IRS or the State of Missouri for the years, 1987, through and including 1993; and

2. WHEREAS, Client wishes to have Attorney represent him, but does not have the present cash with which to pay the Attorney ~ and
3. WHEREAS, Attorney is willing to represent Client upon client`s proposal to give him a Second Deed of Trust in the property commonly referred to as 2905 Oakville, DeSoto, Missouri 63020.

17. Attorney agrees. to represent the Client regarding his income tax returns for the years 1987 through and including 1993 both before the Internal Revenue Service and before the Missouri Department of Revenue.

3. On the same date of September 22, 1994, in an effort to guarantee that he would receive his fee for legal services rendered, Snyder had Mahendra sign a Promissory Note in favor of Snyder for advances up to $35,000.00 and executed a Deed of Trust pledging his property located at 2905 Oakville, DeSoto, Missouri (DeSoto Property) to Snyder in order to secure the Note. The Deed of Trust was recorded with the Jefferson County Recorder of Deeds. The Note provided in part:

The consideration for the advances are legal services which have just begun and some of which have just recently been provided and for future legal services all pursuant to a separate agreement between the parties and denominated Representation Agreement.

Such security instrument is governed by the provisions of V.A.M.S. Section 443.055 regarding future advances.

The Deed of Trust refers to Snyder as •• . . party of the third part, a creditor. (emphasis added)

4 • Mr • Mahendra retained Synder to represent him for his bankruptcy case on November 23, 1994, the evening before Thanksgiving. Mahendra ` s voluntary Chapter 7 petition was filed on November 28, 1994 • In answer to the question whether Snyder made any f cc arrangements with Mahendra with respect to the bankruptcy proceedings, Snyder responded in his deposition:

We considered it to be a continuation of the criminal representation and his method of paying, which was I was to be paid from the proceeds from that sale of his house. And that was secured by a Deed of Trust for advances for the services that I performed. There was also a fee agreement pursuant to the compensation disclosure that was included in the bankruptcy filing.

When asked, what was Mr. Mahendra 'sgoal in filing a Chapter 7 proceeding?' Snyder answered:

A. His immediate goal, as was stated on the petition, was to avoid the foreclosure on his home, his residence.

In an effort to explain the nature of the service and when he provided it, Snyder gave the following answer when asked, 'ant is it accurate to say that you were representing Mr. Mahendra on an ongoing basis with the IRS investigation?" To which Snyder answered:

Right. But that was exclusive up until the night before Thanksgiving. And then all of it from there on up to the filing of the bankruptcy was the bankruptcy along with some additional for the tax, but it was minimal.

5. The Debtor paid the filing fee, but neither he nor anyone else has paid Mr. Snyder for any of the services he provided.

6. Snyder acknowledges that he was a creditor of the Debtor on November 28, 1994, the day Mahendra's bankruptcy petition was filed. Although the Debtor's schedules do not state a specific amount that he owed Snyder, schedule D does list Snyder as a holder of a lien: '2nd D/T for legal services, including advances to $35,000. Claim is: Contingent and unliquidated.'

7. Snyder admits that as a creditor he may have an interest adverse to the bankruptcy estate. The following question and answer were given during his deposition:

Q. as a pre—petition creditor of Mr. Mahendra did you consider yourself to have an interest adverse to the bankruptcy estate?

A. I think —— I don't know really as adverse. As a claim against the estate, there's an interest against the estate. Well, you know, I think! guess it became adverse at the point that if you are contesting -- you tell me you were probably not contesting the pre-petition fees so unless, you know, upon review of my statements you find something that' s objectionable, I'd say, yeah, I guess we could be adverse at that point in time.

8. Snyder filed his Statement of Attorney for Petitioner Pursuant to Bankruptcy Rule 2016(b) form, which contains inconsistent assertions:

(2) The compensation paid or agreed to be paid by the debtor(s) to the undersigned is:

(c) the unpaid balance due and payable is . . . Debtor has agreed to pay attorney at the rate of $120/hr and to pay all costs and expenses of attorney. Said agreement is secured by a promissory note and deed of trust.

(6) The source of payments to be made by the debtor(s) to the undersigned for the unpaid balance remaining, if any, will be from earnings, wages and compensation for services performed,

9. Snyder claims that he is entitled to be paid for the assistance he rendered the bankruptcy estate, even though he never sought approval of this court to represent the estate, nor was he ever retained by the Trustee. He bases this claim on the assertion that the Trustee did not respond to the Bank' s Motion for Relief from Stay and if it had not been for Snyder's action, the stay would have been lifted and the DeSoto property would have been lost in foreclosure • It is true that the trustee did not file a written response to the Bank's motion, but the record reveals that the trustee's attorney appeared at the hearing and argued that the motion should be denied mince there warn equity in the property.The trustee sought permission to sell the property and the Dank consented to the Trustee's efforts. Snyder also claims he played a role in obtaining a larger sale price and provided ongoing services for the sale of the property by working with the Realtor. In an affidavit, Robert Eggman, the Trustee's attorney, denied he ever asked Snyder to assist in the sale of the property or work with Mr. Kennedy, the real estate agent.

10. The Trustee began negotiations to sell the DeSoto property for the benefit of the bankruptcy estate and on April 28, 1995, the Trustee closed the sale of the real estate for the purchase price of $165,000.00. After payment of real estate sales commission, payment to Boatmen's National Bank on their First Deed of Trust and other miscellaneous expenses associated with the sale, the sum of $17,171.64 was deposited into the bankruptcy estate's bank account. Prior to the sale of the real estate, Trustee and Snyder agreed that to the extent Snyder had a valid lien on the real estate, the lien would attach to the proceeds of the sale of the DeSoto property and the property would be sold free and clear of all liens.

11. Snyder testified at his August 8, 1995 deposition that he was owed the sum of $13,484.68 for all legal services rendered and not solely for representing the debtor in his bankruptcy case. Snyder stated, 'A lot of it's

for tax work, it's not just f or representing the debtor • It' s an agreement that the debtor entered into before the bankruptcy ever came into being." In Snyder' 5 Objection To Application To Sell Real Estate and To Employ And Pay Realtor, which he filed on April 4, 1995, he indicated his pre-petition fees were $5,450.80.

12. Snyder asserts that he is entitled to compensation for services rendered on behalf of the Debtor both pre-petition and post petition based on the Note and Deed of Trust. Snyder filed his time records which indicate he seeks $4,348.80 for pre—petition tax work on behalf of Mahendra in keeping with the Representation agreement.

DISCUSSION

A. To The Extent Snyder 'S Lien Is Valid It Does Not Cover Any Legal Representation Beyond Tax Matters Set Forth In The Representation Agreed Of September 22, 1994.

Regardless of what Snyder claims were his and his client's intentions concerning the extent of the lien Snyder placed on his client's DeSoto property, that lien, to the extent that it is valid, simply does not cover all the legal services Snyder rendered on behalf of Mahendra. The Representation Agreement of September 22, 1994 was drafted by Snyder for the limited purpose of representing Mahendra on tax matters. The language of the Agreement is straight forward and unmistakably clear:

1 • WHEREAS, Client may not have filed income tax returns with either the IRS or the State of Missouri for the years, 1987, through and including 1993; and

2. WHEREAS, Client wishes to have Attorney represent him, but does not have the present cash with which to pay the Attorney; and

3 • WHEREAS, Attorney is willing to represent Client upon client's proposal to give him a Second Deed of Trust in the property commonly referred to as 2905 Oakville, DeSoto,Missouri 63020.

17. Attorney agrees to represent the Client regarding his income tax returns for the years 1987 through and including 1993 both before the Internal Revenue Service and before the Missouri Department of Revenue.

The Representation Agreement was executed two months before Snyder undertook to represent Mahendra in bankruptcy. In fact, Snyder explained how the bankruptcy petition was hastily completed by snyder on Thanksgiving day in order to avoid foreclosure on Mahendra's house. The Agreement did not anticipate, nor mention that Snyder would represent Mahendra on any legal matters other than his tax problems for the years 1987 through 1993. The Deed of Trust that pledged the DeSoto property as security for the promissory Note and Snyder's fee was silent as to the exact nature of the legal service that Snyder would provide, but it stated that the . . . legal services (were] all pursuant to a separate agreement between the parties and denominated Representation Agreement." Thus it is clear that whatever secured interest Synder has in the DeSoto property, it is limited to the fees earned while representing Mahendra with his tax problems.

B. <u>To The Extent Snyder 'S Lien Is Valid, It Was Extinguished On The Petition Date With Respect To Any Further Future Advances</u>

On November 28, 1994, the Debtor filed his voluntary Chapter 7 Petition in the bankruptcy Court • As of that date Mahendra was the owner of the DeSoto property subject to all valid liens. Upon filing his petition, Mahendra' s real property became property of the bankruptcy estate pursuant to 11 U.S.C. S542. At that point,the Debtor lost all legal control over the property and lost all rights to authorize his attorney to perform legal services, which would further encumber the assets of this bankruptcy estate, including the DeSoto property. It became the sole responsibility of Mr. Dewoskin, the Trustee, to administer the estate. As the Trustee he, and not the Debtor, is authorized to seek the court's permission to retain the assistance of legal counsel and other professionals. He exercised that right by seeing and receiving this court's authority to retain the legal assistance of Robert Egguan. No one sought permission to retain Snyder to represent the estate and/or the Trustee. Neither the Debtor nor Snyder sought or obtained the Bankruptcy Court' s approval to continue to draw upon the alleged future advance clause contained in the Note, the Representation Agreement and/or the Deed of Trust. Therefore, to the extent Debtor and Snyder attempted to do so, said attempts constitute unauthorized post petition transfers pursuant to 11U.S.C. 549.

C. Snyder is not entitled to receive compensation from the assets of the estate for post petition legal services

As previously noted, Snyder's lien did not extend to cover post petition legal services he may have rendered Mahendra. However, Snyder contends that the services he rendered did not only assist his client, but were also

beneficial to the Bankruptcy estate and therefore his fees should be classified as administrative expenses • In order to receive compensation for legal services as an administrative expense, it is necessary for Snyder to apply to the court for compensation pursuant to 11 U • S • C. S330(a) (3), which provides in part:

(A) In determining the mount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including -

(A) the time spent on such services;

(3) the rates charged fro such services

(C) whether the services were necessary to the administration of, or beneficial at the time at which his service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable mount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(3) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

It must be kept in mind that neither the Trustee, Snyder nor the debtor ever sought authority to employ Snyder on behalf of the estate. If anyone had made such a request or should file an application nunc pro tunc, the Court would deny the application for the simple reason that he is not disinterested as required by S327(a), which provides in part:

S327 employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court`s approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee' s duties under this title.

A disinterested person is defined in section101:

A 'disinterested person means person that
(A) is not a creditor, an equity security holder, or an insider:

(E) does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in the subparagraph (B) or (C) of this paragraph, or for any other reason;

Under section 101(14) Snyder does not qualify as a 'disinterested person. He is not only a substantial creditor, but he also holds interests adverse to the estate, his client, the IRS and other creditors • As an alleged pre-petition secured creditor Snyder' s interest is definitely adverse to that of his client. The federal and state tax claims in this case are priority non—dischargeable claims in excess of $425,366.85. It is in Snyder's personal best interest to prevail in his argument that his claim for legal services rendered Mahendra is secured by the Deed of Trust on the Desoto property. If Snyder prevails, his fee will be paid out of the balance remaining from the sale of the DeSoto property and those funds will not be available to pay the non-dischargeable tax claims. In contrast, it is in Mahendra ' s best interest for his attorney not to prevail since that will alter Snyder's pre-petition claim from secured to an unsecured claim that will be discharged in this bankruptcy and provide funds to reduce the non—dischargeable claims of taxing authorities.

Accordingly, Snyder could not qualify to represent the estate as an attorney pursuant to 11 U.S.C. 5327(a) and 5101(14) (A) and (B) and therefore is not entitled to receive compensation from the estate as an administrative expense for post petition legals services rendered. See in re*Pierce*. 53 B.R. 825(D. Minn. 1985), 809 F.2d 1356 (8th Cir. 1987); **Tn re Michigan** general Corp-, 77 B.R. 97(Bankr. N.D. Tex. 1987).

D. Legal services Rendered for the petition tax and Other Non bankruptcy matters

—Snyder acquired a security interest in the DeSoto property based on the Representation Agreement, which was executed by the Debtor and Snyder on September 22, 1994, and the promissory Note and Deed of Trust, which Mahendra executed on the same date. The Deed of Trust was recorded with the Jefferson County Recorder of Deeds and no one has claimed Snyder's security interest was not properly perfected. Snyder is entitled to receive a reasonable fee for the tax legal service he provided pre-petition to the extent it conforms to the provisions of the a representation Agreement. Any other non tax or bankruptcy legal service Snyder may have provided Mahendra

pre—petition is simply an unsecured pre-petition debt. Accordingly, Snyder is entitled to receive $4,348.80 from the proceeds of the sale of the Desoto property for the pre—petition legal tax services he provided for Nahendra.[1]

E. **Compensation For Legal Services Rendered For Pre Petition Bankruptcy Matters And The Appropriateness In Reduction Of Compensation.**

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[1]Snyder argued that his lien extended to the $8,000 exemption claimed by Mahendra. Since the Trustee holds funds sufficient to pay Snyder the $4,348.80, it is not necessary to address that issue.

Snyder is entitled to receive payment of his pre—petition fees in connection with the services he provided Nahendra in planning, preparing and filing the necessary schedules and petition in the Bankruptcy Court. This service benefited both the Debtor and the bankruptcy estate and therefore these fees qualify as an **administrative** expense. In determining the appropriate f cc, it is important to keep in mind that Mahendra 's **actual** bankruptcy case **was routine and not** complex. It did not require a great deal of preparation and/or work to file. In fact, it was hastily prepared on Thanksgiving Day to stop a foreclosure on the Debtor's home. Since Snyder had placed a lien on the property, the prevention of a foreclosure was not only beneficial to his client, but was certainly beneficial to Snyder. considering the lack of complexity and the customary legal fees that are awarded in this community for similar work, the Court awards Snyder a fee of $1,000.00 as an administrative expense for the preparation and filing Mahendra ' s Chapter 7 schedules and petition. The Court concludes this fee is reasonable and perhaps even generous under the circumstances of this case.

Having determined that Snyder is entitled to receive compensation for the services he provided his client in the preparation and filing of the Chapter 7 Petition and Schedules, it is appropriate under the facts and circumstances of this case to consider whether Snyder's fee should be reduced • It is appropriate to deny or reduce compensation to a professional that represents parties who have an interest adverse to the bankruptcy estate • See In re **Areaco Investments Cc.**, 152 B.R. 597 (Bankr. E.D. 340. 1993). In this case Snyder represented himself and Mahendra. '. . . The established standard for imposing sanctions is an objective determination of whether a party' s conduct was reasonable under the **circumstances.' In re Armwood**, 175 B.R. *779*, 788 (Bankr. N.D. Ga. 1994) citing Donaldson **v.**

Clark, 819 F.2d **1551 (11th Cir. 1987).** The purpose **of** filing the bankruptcy was to prevent a foreclosure on the DeSoto property, which was mutually beneficial to the interest of the Debtor and Snyder, since Snyder had his security interest to protect. However, their interests quickly parted as Snyder attempted to impose his lien on the proceeds of the sale of the DeSoto property. As previously noted, Snyder's efforts to collect all his fees from the proceeds of the DeSoto property is directly adverse to the interest of Mahendra and not in conformity with the Representation Agreement, Promissory Note and/or the Deed of Trust. Snyder's security interest was limited to the value of his pre—petition legal representation in tax matters and when he argued that the lien covered other matters, his argument was in direct conflict with his client' s interest to pay the IRS nondisohargeability claim. Unfortunately, Snyder's conflict of interest and position is so egregious, the Court reduces his fee by $1,000.00.
An Order consistent with this Memorandum Opinion will be entered this date.

S / David P. McDonald, U.S. bankruptcy judge

DATED: May 6, 1996

Bankruptcy court order of 1/13/95

—-a—. ~

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re: B. MAhENDRA,)	)Case No. 94—46400—293
Debtor,	) Chapter 7
	) **Hearing Dates** January 5, 1995
TEE BOATMEN' S NATIONAL	)
BANK OF ST. LOUIS, NA.,	) Hearing Time: 10:00 a.m.
Movant.	)

ORDER

At St. Louis, Missouri, in this District, this, 13th day of January, 1995.

The Court having called for hearing the Motion of **Boatmen's** Rational Bank of St. Louis For Relief From the Automatic Stay, and upon announcement of the attorney for the chapter 7 trustee that the real property subject to the Motion has valuable equity which may result in a distribution to Chapter 7 creditors, and by consent of the attorney for Boatmen's and the attorney for the Trustee;

IT IS HEREBY ORDIRED that the Motion is granted in part and overruled in part, and that the automatic star. of 11 U.S.C. 6362 shall remain in full force and effect through February 17, 1995, so that the Trustee in bankruptcy may attempt to obtain a firm offer for the purchase of the real property at issue; and further,

IT IS ORDERED that in the event a firm contract for thepurchase of the property is not received prior to February 17, 1995, the Trustee's interest in the property shall be deemed *A*bandoned and the automatic stay of 11 U.S.C. 6362 shall be lifted to permit Boatmen's National Bank of St. Louis to foreclose upon its security interest in the real property, all pursuant to the laws of the State of Missouri~ and further

IT IS ORDERED that nothing contained herein shall prevent the Trustee or Boatmen's from seeking to modify this Order for cause at any time hereafter.

S /HONORABLE DAVID P. McDONALD, Judge, U. S. Bankruptcy Court